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IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

FOX NEWS NETWORK, LLC, and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Exemption 4 of the Freedom of Information Act authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). The Second Circuit ruled that this exemption does not authorize the Board of Governors of the Federal System (the "Board") to withhold reports disclosing the identities of banks that obtained loans through the Federal Reserve System, along with the amounts and durations of such loans. In doing so, the Second Circuit held that (1) the highly confidential bank information in these reports was not "obtained from" the borrowing banks; and (2) the Board could not withhold this information on the basis that its disclosure would impair the effectiveness of its lending programs.

The questions presented are:

1. Whether the identity of, and highly confidential terms on which, a third party transacts with a federal agency is information "obtained from" that party and, therefore, within the scope of FOIA Exemption 4?

2. Whether information is "confidential" under FOIA Exemption 4 when its disclosure would impair the effectiveness of federal agency programs?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is The Clearing House Association L.L.C. The respondents are Fox News Network, LLC, and the Board of Governors of the Federal Reserve System.

The Clearing House Association L.L.C. has no corporate parents, and no publicly-held company owns 10% or more of the stock of The Clearing House Association L.L.C.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Clearing House Association L.L.C. ("The Clearing House")[1] respectfully petitions

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[1] Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs, and white papers the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks

(footnote continued)

for a writ of certiorari to review the March 19, 2010 judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit is reported at 601 F.3d 158 (2d Cir. 2010). The August 20, 2010 Order of the Second Circuit denying rehearing is unreported. (A-5-6.)[2] The August 27, 2010 Order of the Second Circuit granting the Board of Governors of the Federal Reserve System (the "Board") a 60-day stay of the mandate is unreported. (A-3-4.) The November 16, 2010 Order of the Second Circuit granting The Clearing House post-judgment intervention and a stay of the mandate pending the filing of this Petition is unreported. (A-1-2.) The decision of the District Court is reported at 639 F. Supp. 2d 384 (S.D.N.Y. 2009).

JURISDICTION

The Second Circuit entered its judgment on March 19, 2010, and denied the Board's petition for panel and *en banc* rehearing on August 20, 2010. By order dated August 27, 2010, the Second Circuit granted the Board a 60-day stay pending the filing of a Petition for a Writ of Certiorari. On October 26, 2010, after the Solicitor General declined to grant

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(footnote continued)
and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. *See* www.theclearinghouse.org (last visited on Nov. 17, 2010).

[2] All citations to "A- _" are to the Appendix to this Petition.

the Board's request for permission to file a Petition for a Writ of Certiorari, The Clearing House promptly moved to intervene as a party and to stay the mandate. By order dated November 16, 2010, the Second Circuit granted The Clearing House's intervention motion and granted The Clearing House a seven-day stay of the mandate pending the filing of the instant Petition. (A-1-2.) This Petition, timely filed within 90 days of the Second Circuit's August 20, 2010 denial of rehearing, invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

STATEMENT OF THE CASE

The instant Petition seeks review of the Second Circuit's judgment in *Fox News Network, LLC* v. *Board of Governors of the Federal Reserve System*, 601 F.3d 158 (2d Cir. 2010) ("*Fox*"), based on the same questions presented by The Clearing House in its earlier Petition for a Writ of Certiorari, filed with this Court on October 26, 2010, to review the judgment in the companion appeal of *Bloomberg, L.P.* v. *Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010) ("*Bloomberg*"), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct. 26, 2010) (No. 10-543).

For the Court's convenience, The Clearing House largely incorporates in this Petition the substance of the arguments advanced in its

Bloomberg Petition, with specific citations to the record on appeal in *Fox* and additional discussion of the procedural posture of the *Fox* action.[3]

The Companion Bloomberg and Fox Appeals. The Petitions filed by The Clearing House in *Bloomberg* and *Fox* arise from closely related appeals. Both appeals concern Board reports reflecting highly confidential information about the identities of banks that borrowed through certain Board lending programs, along with the loan-by-loan details of their borrowings (specifically, the Board reports at issue in *Bloomberg* are a subset of the broader span of reports at issue in *Fox*); were heard in tandem by the same Second Circuit panel; and were decided by separate opinions issued on the same day.

In its *Bloomberg* decision, the Second Circuit ruled that the Board was not authorized under Exemption 4 of the Freedom of Information Act ("FOIA") to withhold the identities of financial institutions that borrowed from certain Federal Reserve lending programs and the amounts and durations of their loans, because (1) this highly confidential information was not "obtained from" the borrowing institutions; and (2) assuming this information was "obtained from a person" (the panel was referring here to the Federal Reserve Banks ("FRBs") that supplied the raw lending data to the Board), Exemption 4 did not authorize a federal

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[3] All citations to "*Fox* JA" are to the Joint Appendix submitted before the Second Circuit in *Fox*. All citations to "*Bloomberg* JA" are to the Joint Appendix submitted before the Second Circuit in *Bloomberg*.

agency to withhold information, even the most highly confidential information, on the basis that its disclosure would impair the effectiveness of its programs.

The Second Circuit then applied its *Bloomberg* holdings to require the Board to release the information at issue in *Fox*. *See Fox*, 601 F.3d at 160 ("For the reasons stated in the tandem case, [*Bloomberg*], the information unambiguously at issue in the Fox News requests—the identity of the borrowing bank, the dollar amount of the loans, the collateral securing the loans, and the loan origination and maturity dates—is not protected from disclosure by Exemption 4."). In *Fox*, the Second Circuit then proceeded to address the issue—not relevant to the instant Petition—of whether the Board had adequately searched for additional agency records held at the FRBs. *See id.* at 160-63.

Because the only aspect of the *Fox* decision that The Clearing House asks this Court to review is derivative of the Second Circuit's holdings in *Bloomberg*, all references below to the Second Circuit's rulings in *Bloomberg* apply equally to this Petition.

The Separate Certiorari Petitions in Bloomberg and Fox. The reason why The Clearing House is filing the instant *Fox* Petition separately from its Petition in *Bloomberg* is procedural.

In *Bloomberg*, The Clearing House was granted post-judgment intervention at the District Court level. This ruling authorized The Clearing House to participate as a party throughout the appeal before the Second Circuit, including moving

for a 60-day stay of the mandate to file a certiorari petition on October 26, 2010, that is, within the time period of that stay.

Unlike in *Bloomberg*, The Clearing House did not—and had no reason to—intervene after judgment was rendered at the District Court level in *Fox*. The Board was the prevailing party before the District Court and, unlike in *Bloomberg*, thus did not require the Solicitor General's approval to defend the District Court's ruling on appeal in *Fox*. As a result, the Board was in a position to protect The Clearing House's interests in its members' highly confidential information as reflected in the Board reports at issue.

On appeal in *Fox*, the Board in fact defended The Clearing House's interests before and after judgment, including by obtaining Solicitor General approval to file a petition for *en banc* rehearing on May 3, 2010 on the same two issues presented by The Clearing House in this Petition.

It was only on October 22, 2010, when counsel for the Board informed counsel for The Clearing House that the Solicitor General did not authorize the Board to file a petition for certiorari in either *Bloomberg* or *Fox*, that the Board no longer adequately protected The Clearing House's interest in its members' highly confidential information at issue in the *Fox* appeal.

This notification prompted The Clearing House to move shortly thereafter, on October 26, 2010, to seek post-judgment intervention in *Fox* in order to stay the mandate in *Fox* pending the disposition of its Petition in *Bloomberg*; or,

alternatively, pending the filing of a separate Petition for a Writ of Certiorari in *Fox* that would present the two same two questions of law presented in The Clearing House's *Bloomberg* Petition. This intervention motion was necessary, because, absent a stay of the Second Circuit's mandate in *Fox*, the disclosure of the highly confidential bank information at issue in *Fox* (of which the information in *Bloomberg* is a subset) would have mooted The Clearing House's pending Petition for a Writ of Certiorari in *Bloomberg*.

On November 16, 2010, the Second Circuit granted The Clearing House's intervention and stay motions. (A-2.) In doing so, the Second Circuit conferred upon The Clearing House party status in *Fox* to afford it "an opportunity to file a petition for the Writ of Certiorari to the United States Supreme Court." (*Id.*) This Petition followed.

The Bloomberg Rulings Upon Which the Fox Decision is Based. The rulings in the *Bloomberg* decision, in which the Second Circuit openly split with the D.C. and First Circuits, stem from an unprecedented FOIA request by Bloomberg (later copied by an even broader FOIA request by Fox) demanding that the Board disclose highly confidential reports containing the identities of banks that borrowed from the Discount Window (a permanent lending program of the FRBs) during the recent financial crisis, along with the amounts and durations of such loans.[4]

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[4] The request also demanded that the Board disclose such information for the now-discontinued Primary Dealer Credit *(footnote continued)*

The request is unprecedented because, since the establishment of the Discount Window program in 1914, the Board has never disclosed the identities of borrowing banks or the loan-by-loan details of their borrowings. (The Board has historically published such information weekly on an aggregate basis.) That longstanding policy of borrower confidentiality rests on the recognized concern that depositors, counterparties, and market participants may infer (perhaps erroneously) that a bank that borrows from the Discount Window is experiencing liquidity problems and react by withdrawing their funds from the bank or discontinuing to extend credit. When borrowing from the Discount Window, banks had understood that their identities and individual borrowings would be kept confidential. Indeed, the FRBs' public Discount Window website then stated that "the Federal Reserve does not publish information about individual institutions' borrowings."[5]

The Dodd-Frank Act now requires the Board to disclose the identities of banks that borrow from

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(footnote continued)
Facility ("PDCF"), Term Securities Lending Facility ("TSLF"), and Term Auction Facility ("TAF"). Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Board will be required to disclose transaction-level details of loans made through the PDCF, TSLF and TAF, including the identities of borrowing entities, on or before December 1, 2010. *See* Dodd-Frank Act § 1109(c). Accordingly, the portion of this case about those facilities will be moot as of that date.

[5] Brief of Intervenor-Appellant The Clearing House Association L.L.C., Nov. 6, 2009, at 14, No. 09-4083-cv (2d Cir.).

the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See infra* at 15-16. But the Act does *not* require the Board to disclose information concerning Discount Window lending that took place prior to the Act's enactment. Allowing the Board to withhold this pre-enactment Discount Window lending information is important, because disclosure of this information threatens to harm the borrowing banks by allowing the public to observe their borrowing patterns during the recent financial crisis and draw inferences—whether justified or not—about their current financial conditions. *See infra* at 13-14.

In both *Bloomberg* and *Fox*, the Board sought to protect this Discount Window lending information by invoking FOIA Exemption 4, which authorizes a federal agency to withhold "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4). Numerous circuit courts have held that information is "confidential" when its disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The D.C. and First Circuits have further held that information is "confidential" when its disclosure would impair an agency's ability to "carry[] out [its] mandate." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983); *accord Critical*

Mass Energy Project v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

In *Bloomberg*, the Second Circuit recognized the Board's and the banks' "plausible" and "forceful[]" showing that disclosure of the information sought by Bloomberg "would harm the banks that borrowed" and "the banking system as a whole." *Bloomberg*, 601 F.3d at 151. Nevertheless, the Second Circuit held—as a matter of law—that (1) the FRBs' "executive action" in approving the Discount Window loans meant that the highly confidential bank information was not "obtained from a person" outside the government, and therefore not subject to Exemption 4 protection at all, *id.* at 149; and (2) even assuming that such bank information was "obtained from a person" (the Court here was referring to the FRBs that supplied the raw lending data to the Board), Exemption 4 does not allow an agency to withhold information when doing so "'serves a valuable purpose and is useful for the effective execution of its statutory responsibilities,'" *id.* at 150.

These important rulings of law warrant this Court's review for two reasons.

First, the Second Circuit's rulings will disrupt "long-established procedures" of numerous federal agencies. *See Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 11 (1974) (grant of certiorari to analyze "the impact of the FOIA upon long-established procedures of the Renegotiation Board"). Many government programs, such as the Export-Import Bank's provision of loans and insurance and the National Institutes of Health's ("NIH") licensing of government inventions, depend

on assuring third parties that details of their commercial transactions with federal agencies will remain confidential.

The Second Circuit's holding that the FRBs' "executive action" in approving Discount Window loans eliminates Exemption 4 protection for this highly confidential bank information conflicts with this line of cases and threatens to harm the government programs they protect. The harm here is magnified, because any FOIA requester that resides in the Second Circuit will be able to bind a federal agency to that Court's law. *See* 5 U.S.C. § 552(a)(4)(B). This is especially important in that many of the nation's leading media companies are located in the Southern District of New York.

The line of cases that the Second Circuit's ruling will disrupt is consistent with the bedrock principle, codified in 5 U.S.C. § 552(b) and recognized across the Circuits, that an agency is authorized to withhold information in its entirety where the information consists of exempt data and non-exempt data that are "inextricably intertwined." *See infra* at 31-33. This rule applies fully when third parties transact with a federal agency.

Second, the Second Circuit's ruling "conflict[s] with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 151 (1989) (grant of certiorari in FOIA Exemption 7 case because of "the importance and sensitivity of the issue [presented] and because of different interpretations of the pertinent language of [the exemption]"). Specifically, the Second Circuit's ruling—now binding the financial and media capital

of the United States—split with the D.C. and First Circuits on an important question of federal law: Whether information is "confidential" within the meaning of Exemption 4 when its disclosure would impair the effectiveness of government programs.

A. Factual Background.

1. The Discount Window and the Mechanics of Discount Window Lending.

Authorized by the Federal Reserve Act, the Discount Window "is a mechanism by which the twelve Federal Reserve Banks lend funds on a short-term basis, secured by collateral, to eligible depository institutions within their respective districts." (*Fox* JA-127 ¶ 6; *Bloomberg* JA-67 ¶ 6.) In performing this lending function, the Discount Window can serve "as an emergency, back-up source of liquidity for institutions that may not have access to ordinary, market sources of funding on a short term basis." (*Fox* JA-138 ¶ 23; *Bloomberg* JA-74 ¶ 18.)

A bank eligible to borrow from the Discount Window requests a Discount Window loan by contacting its local FRB. When doing so, the bank supplies to the FRB, among other things, the bank's (i) "[n]ame and location"; (ii) "[t]he amount [the bank is] requesting"; and (iii) "[t]he number of days that funds will be needed."[6] After a bank initiates a

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[6] The Mechanics of Borrowing, http://www.frbdiscountwindow.org/mechanics/cfm?hdrID=14 (last visited on Nov. 17, 2010).

Discount Window loan request, FRB staff "review the request, verify collateral and, if approved, enter the loan in the [FRB's] loan and accounting systems." (*Fox* JA-133 ¶ 16; *Bloomberg* JA-70 ¶ 11.)

The FRBs, in turn, provide data concerning completed loans to the Board's Division of Monetary Affairs. (*Fox* JA-155 ¶ 15; *Bloomberg* JA-38 ¶ 11.) Then, the Monetary Affairs staff use these data to generate "Remaining Term Reports"—the Reports at issue in this appeal—that reflect (i) the names of the borrowers; (ii) the amount of individual loans; and (iii) the origination and maturity dates of each loan. (*Id.*)

2. The Recognized "Stigma" of Financial Weakness Attributed to Banks That Borrow from the Discount Window.

Because the Discount Window can serve an emergency-lending function, when a bank borrows from it, market participants, customers, and counterparties may infer that the bank is experiencing "an underlying capital or liquidity problem." (*Fox* JA-138 ¶ 23; *Bloomberg* JA-74 ¶ 18.) The public, in other words, may interpret a bank's Discount Window borrowing as a sign of an undisclosed financial problem and mistakenly stigmatize the bank as financially unsound. (*Fox* JA-138 ¶ 23; *Bloomberg* JA-74-75 ¶¶ 17-18.) That "stigma" can "quickly place an institution in a weakened condition vis-à-vis its competitors by causing a loss of public confidence in the institution, a sudden outflow of deposits (a 'run'), a loss of confidence by market analysts, a drop in the

institution's stock price, and a withdrawal of market sources of liquidity." (*Fox* JA-137-38 ¶ 22; *Bloomberg* JA-74 ¶ 17.) "In extreme cases, such developments can lead to closure of the institution." (*Id.*)

During periods of financial distress, the stigma associated with Discount Window borrowing often intensifies, because market participants have heightened concerns that banks may be experiencing financial difficulties. (*Fox* JA-138-39 ¶ 24; *Bloomberg* JA-75 ¶ 19.) As a result, during these periods (such as those experienced in the early and late 1990s), banks paid higher rates in the private federal funds market to avoid borrowing from the Discount Window. (*Id.*)

The effects of this stigma were further evidenced in the early 1990s, when rumors that Citibank was borrowing at the Discount Window sparked runs at some of its offices in Asia. (*Fox* JA-140 ¶ 27; *Bloomberg* JA-76 ¶ 22.) Similarly, in September 2007, British bank Northern Rock experienced a bank run after the BBC reported that the Bank of England had provided emergency financial support to the bank. *See* Treasury Committee, The Run on the Rock, 2007-08, H.C. 56-1, ¶¶ 1, 147.[7]

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[7] Available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56i.pdf (last visited Nov. 17, 2010).

3. The Board's Longstanding Confidentiality Policy for Discount Window Lending and the New Dodd-Frank Disclosure Regime.

Because of the recognized stigma associated with accessing the Discount Window, banks have been reluctant to access this lending facility, even though the Board has long held "information about borrowing by individual banks in the strictest confidence." Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Program*, 88 Fed. Res. Bull. 313, 315 (2002). That historical reluctance stems from the fact that, notwithstanding the Board's longstanding non-disclosure policy, market participants "have at times tried to infer which banks might be borrowing [from the Discount Window] through knowledge of which banks were bidding for funds in the market late in the day and from aggregate data published by the Federal Reserve." *Id.*

The Dodd-Frank Act establishes a new disclosure regime for Discount Window loans made after the Act's enactment. The Board is now required to disclose the identities of banks that borrow from the Discount Window, along with other transaction-level details of their borrowing, approximately two years after such borrowing occurs. *See* Dodd-Frank Act § 1103(b) (amending Federal Reserve Act to require disclosure of post-enactment Discount Window lending—a type of "covered transaction"—"on the last day of the eighth calendar quarter following the calendar quarter in

which the covered transaction was conducted").[8] In exchange, the Board is expressly authorized to withhold such information under FOIA. *See id.* (providing that enumerated Discount Window lending data "shall be confidential, including for purposes of section 552(b)(3) of title 5").

Of importance to this Petition, the Dodd-Frank Act does not require disclosure of Discount Window lending information prior to its enactment. Specifically, Section 1103(b) of the Act, which adds a new section to the Federal Reserve Act, expressly provides that "[n]othing in [the new section of the Federal Reserve Act] is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment." This is significant, because, during the recent financial crisis, banks relied upon the Board's confidentiality policy when obtaining Discount Window loans in amounts and at intervals that would permit the public to draw inferences—whether fairly or not—about their current financial conditions.

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[8] *See also* Frequently Asked Questions—Discount Window Lending Program, FAQ #11 ("[T]he Federal Reserve will publicly disclose, with approximately a two-year lag, certain information on discount window loans extended on or after July 21, 2010."), http://www.frbdiscountwindow.org/dwfaqs.cfm#ps11 (last visited Nov. 17, 2010).

B. Proceedings Below in *Bloomberg* and *Fox*.

1. Bloomberg's FOIA Request and Its Adjudication in the District Court.

On May 21, 2008, Bloomberg sent a FOIA request to the Board, asking for eleven categories of documents relating to securities posted as collateral for Discount Window and other loans made between April 4, 2008 and May 20, 2008. (*Bloomberg* JA-50-51.) The Board determined that the Reports contained information responsive to the request specifically, the names of borrowers, and the amounts and terms of individual loans—but concluded that this information was exempt from disclosure. (*Bloomberg* JA-62.)

On November 7, 2008, Bloomberg filed a FOIA action in the Southern District of New York. The Board and Bloomberg each moved for summary judgment, submitting supporting declarations. Specifically, the Board submitted 38 pages of declarations from a senior Board official and two officers of the Federal Reserve Bank of New York responsible for operational details for the Discount Window and the other lending facilities at issue. In those declarations, the Board provided a detailed assessment of the competitive harm likely to occur to banks through disclosure of bank-by-bank, loan-by-loan information. The Board also provided detailed evidence demonstrating the recognized "stigma" associated with Discount Window lending.

On August 24, 2009, the District Court granted Bloomberg's cross-motion for summary

judgment, dismissing the Board's evidence of competitive harm as "speculative" or "conjectural" and declining to recognize, as an additional basis for non-disclosure, the Board's interest in advancing its lending programs. *Bloomberg L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280 (S.D.N.Y. 2009). The District Court also held that some of the information contained in the Reports—that is, the amounts and terms of individual loans—was not "obtained from" the borrowing banks, reasoning that the FRBs' "generati[on] [of] the information contained in the [Reports] [was] sufficient to vitiate the applicability of Exemption 4 with respect to that information." *Id.* at 278. At the same time, the District Court recognized that "the borrowers' names," also contained in the Reports, were "obtained from" the borrowing banks. *Id.*

After this ruling, The Clearing House moved to intervene for purposes of appeal, arguing, among other things, that the Board might not adequately protect its interests, because the Board had not yet received Solicitor General authorization to pursue an appeal. The District Court granted The Clearing House's intervention motion, and The Clearing House participated as a party in the appeal to the Second Circuit.

2. Fox's FOIA Request and Its Adjudication in the District Court.

Following Bloomberg's lead, on November 10, 2008, Fox News Network, LLC, ("Fox") filed a FOIA request (which it subsequently clarified and then

supplemented with another) seeking "the names of institutions receiving Federal Reserve lending" from eleven named programs and "any other Federal Reserve lending facility," as well as "an accounting of the collateral provided by these institutions in exchange for the lending" from August 8, 2007 through November 17, 2008. (*Fox* JA-169-71.) In response, the Board identified, among other responsive documents, two types of reports, called "Origination Reports" and "Remaining Term Reports." These reports contained the identities of banks that borrowed from the Discount Window, along with the amounts and durations of the loans they obtained. (*Fox* JA-29-31.) The Origination Reports contained information for the business days of August 20, 2007 to November 14, 2008; the Remaining Term Reports covered an overlapping period of business days from February 11, 2008 to November 14, 2008. (*Id.*) In other words, the reports sought by Fox included the shorter span of reports sought by Bloomberg, which covered the period from April 4, 2008 to May 20, 2008. The Board withheld these reports on the ground that they were exempt under Exemptions 4 and 5 and contained no reasonably segregable non-exempt information. (*Id.*)

Fox, like Bloomberg, filed an action in the Southern District of New York challenging the Board's decision to withhold these reports. On July 30, 2009, the District Court ruled against Fox, holding, first, that the information in the reports at issue reflected "information that originated with the borrower" and therefore "'obtained from' the borrower." *Fox News Network, LLC* v. *Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 399 (S.D.N.Y. 2009). The District Court also

ruled that this information was "confidential" because (1) the Board had sustained its burden of showing "specific and substantial harms to borrowers if the information about Discount Window loans were disclosed"; and (2) disclosure of the reports "would compromise the Board's effective execution of its statutory responsibilities." *Id.* at 400-02.

The District Court subsequently amended and filed its final judgment on September 2, 2009. (*Fox* JA-6.) Fox appealed from this judgment on September 9, 2009, *i.e.*, the same day that The Clearing House moved to intervene in *Bloomberg*. (*Fox* JA-6; *Bloomberg* JA-6, entries nos. 34, 39, 40.)

3. Proceedings Before the Second Circuit in *Bloomberg* and *Fox*.

The *Bloomberg* and *Fox* appeals were heard and decided in tandem, by the same panel and on the same day.

In *Bloomberg*, the Second Circuit rendered the "obtained from a person" and "program effectiveness" rulings described above. In *Fox*, the Second Circuit applied its *Bloomberg* holding to rule, in relevant part, that "the information unambiguously at issue in the Fox News requests—the identity of the borrowing bank, the dollar amount of the loans, the collateral securing the loans, and the loan origination and maturity dates—is not protected from disclosure by Exemption 4." *Fox*, 601 F.3d at 160.

Post-Judgment Developments. On May 3, 2010, the Board and The Clearing House filed timely petitions for panel and *en banc* rehearing of the decision in *Bloomberg*. The Board also filed a similar

petition for rehearing in *Fox*. While those petitions were pending, the Board submitted a letter in both appeals, pursuant to Federal Rule of Appellate Procedure 28(j), explaining that passage of the Dodd-Frank Act did not moot the appeals.[9]

On August 20, 2010, the Second Circuit denied the rehearing petitions in both *Bloomberg* and *Fox*. The Board and The Clearing House then moved to stay the Second Circuit's mandate in *Bloomberg* pending the filing of a Petition for a Writ of Certiorari. The Board filed a similar motion in *Fox*. By Orders dated August 27, 2010, the Second Circuit stayed its mandates for 60 days in both appeals.

On October 22, 2010, counsel for the Board informed The Clearing House that the Solicitor General had denied the Board's request to file a certiorari petition. Shortly thereafter, on October 26, 2010, The Clearing House filed its Petition for a Writ of Certiorari in *Bloomberg*. *See Bloomberg*, 601 F.3d 143, *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct. 26, 2010) (No. 10-543).

The Clearing House's Post-Judgment Intervention and Stay Motions in Fox. Also on October 26, The Clearing House moved before the Second Circuit in *Fox* (1) to intervene as a party; and (2) to stay the mandate in *Fox*, pending either the disposition of The Clearing House's certiorari petition in *Bloomberg*, or to enable The Clearing House to file a separate certiorari petition in *Fox*. In

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[9] *See* Letter from Matthew M. Collette to Catherine O'Hagan Wolfe, dated August 3, 2010, No. 09-4083 (2d Cir.); No. 09-3795 (2d Cir.).

doing so, The Clearing House demonstrated that it had associational standing to intervene and to petition for certiorari, because disclosure of the Origination and Remaining Term Reports at issue (which reflected the Discount Window borrowings of certain Clearing House members) threatened its members with a concrete injury-in-fact[10]; that intervention was timely because sought within the 90-day period to petition for certiorari, and just two business after being notified by the Board that the Board would not file a petition for certiorari; and that intervention was appropriate to allow The Clearing House to move to stay the *Fox* mandate to prevent its *Bloomberg* Petition from becoming moot (because the broader span of reports at issue in *Fox* included the shorter span of reports at issue in *Bloomberg*).

The Clearing House further argued that a stay was appropriate, because there was a "reasonable probability" of obtaining this Court's review and a "fair prospect" that this Court would reverse the Second Circuit's judgment in *Bloomberg* on one or both of the grounds raised in the *Bloomberg* Petition.

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[10] *See generally Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (association has standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."); *see also, e.g.*, *Cuomo* v. *The Clearing House Ass'n, LLC*, 129 S. Ct. 2710, 2714 (2009) (reviewing challenge by The Clearing House to New York Attorney General's investigation of lending practices of certain of its members and other national banks).

Notably, in opposing both motions, even Fox conceded that The Clearing House's Petition in *Bloomberg* arose from "a case that has broad implications for agencies beyond the Federal Reserve system."[11]

By order dated November 16, 2010, the Second Circuit granted The Clearing House's intervention motion and stayed the Court's mandate "to afford [The Clearing House] an opportunity to file a petition for the Writ of Certiorari to the United States Supreme Court." (A-2.) The instant *Fox* Petition followed.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition for two reasons.

First, if left undisturbed, the Second Circuit's "obtained from a person" ruling will undo a long line of cases authorizing federal agencies to withhold sensitive details concerning a third party's commercial transactions with the government. This line of cases protects numerous critical federal programs—such as the ability of the Export-Import Bank to extend loans and insurance, and that of the NIH to license government inventions—that depend on assuring third parties that details of these commercial transactions will not be disclosed. These cases follow the principle, codified in 5 U.S.C.

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[11] *See* Fox News Network, LLC's Memorandum of Law in Opposition to the Motion by The Clearing House Association L.L.C. to (1) Intervene and (2) Stay the Issuance of This Court's Mandate, Nov. 2, 2010, at 18, No. 09-3795-cv (2d Cir.).

§ 552(b), but ignored in the decision below, that an agency is authorized to withhold information where it consists of exempt and non-exempt data that are inextricably intertwined.

Second, the Second Circuit's ruling presents a question of first impression in this Court of undeniable importance to FOIA law, and one over which the Circuits are now plainly split: What is the governing test to determine whether information is "confidential" within the meaning of Exemption 4, and whether this test authorizes an agency to withhold information whose disclosure would impair a government program. The Second Circuit, which has previously adopted *National Parks*' two-part definition of the term "confidential," improperly rejected the D.C. and First Circuits' extension of *National Parks* to protect an agency's ability to effectuate the purposes of its programs. In doing so, the Second Circuit adopted an overly restrictive textual interpretation of the statute that fails to properly give effect to the purpose behind the exemption.

I. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING THREATENS NUMEROUS FEDERAL AGENCY PROGRAMS THAT DEPEND ON MAINTAINING THE CONFIDENTIALITY OF COMMERCIAL TRANSACTIONS WITH SUCH AGENCIES.

A. Courts Have Long Held That FOIA Exemption 4 Protects Commercially Sensitive Details of Third Parties' Commercial Transactions with Federal Agencies.

The Second Circuit held that the highly confidential bank information in the Reports was not "obtained from" the borrowing banks because the loans did not exist but for the FRBs' "executive action" in "grantin[g]" Discount Window loans, even if such approval was "automatic[]." *Bloomberg*, 601 F.3d at 149.

This holding necessarily threatens to undo Exemption 4 protection in numerous situations where third parties transact with a federal agency. That is because *every* commercial transaction by a third party with the government reflects both third-party and government action; the transaction voluntarily entered into by the third party would not exist but for government approval and involvement.

Indeed, one lower court has already applied *Bloomberg* to require the Treasury Department to disclose "the name of a commercial bank" that applied for but subsequently withdrew its request for

funding through a Treasury lending program, reasoning that the bank's name was not "obtained from a person" because it was "'generated within [Treasury] upon its decision to grant a loan.'" *Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, 2010 WL 3705283, at *36-37 (S.D.N.Y. Sept. 3, 2010) (quoting *Bloomberg*, 601 F.3d at 148) (alteration in original).

This ruling is a harbinger of many others, because federal agencies frequently interact with third parties in ways far more extensive than the straightforward loan-approval process at issue here. Nonetheless, in these other situations, numerous courts have held or assumed that a third party's commercial dealings with the government consist of information "obtained from a person," and are therefore subject to Exemption 4 protection—

Loans and Insurance Extended by the Export-Import Bank. The Export-Import Bank is a federal agency that "aid[s] in financing and facilitating exports and the exchange of goods and services between the United States and foreign countries." *Judicial Watch, Inc.* v. *Export-Import Bank*, 108 F. Supp. 2d 19, 24 (D.D.C. 2000). To achieve that goal, the Bank "provide[s] guarantees, insurances, and extensions of credit on competitive terms to United States businesses that seek to export goods and services to other countries." *Id.* These guarantees, insurances, and extensions do not exist but for the Bank's approval, and are subject to negotiation between the Bank, exporters, and other third parties. Parties insured by the Bank, for instance, "often agree to additions to or deletions from the Bank's standard export insurance policy"

that may reflect "when the insured has made a concession to the Bank." *Id.* at 29. The Bank also "participat[es] in the negotiation process" with respect to loan agreements that it finances. *Comstock Int'l (U.S.A.), Inc.* v. *Export-Import Bank of the U.S.*, 464 F. Supp. 804, 807 (D.D.C. 1979).

In *Judicial Watch*, 108 F. Supp. 2d 19, the District Court for the District of Columbia held that the Export-Import Bank properly withheld, *inter alia*, "'the amount of the insurance premium'" being paid by the exporter to the Bank, since "a competitor who is familiar with the way the Bank determines its premium rates . . . could deduce the shipment amount from the premium amount." *Id.* at 31. Before reaching that conclusion, the court emphasized that the information sought by the FOIA requester was obtained by the Export-Import Bank "from the insurance applicants themselves, commercial lenders of the applicant, or a purchaser of the goods at issue." *Id.* at 28.

In *Comstock International*, 464 F. Supp. 804, the District Court for the District of Columbia protected from disclosure a loan agreement to which the Export-Import Bank was a party. The agreement detailed, among other things, "the terms and conditions under which [the Export-Import Bank] and [a private bank]" extended credit. *Id.* at 806. Those details were protected from disclosure even though "the information contained in the loan agreement [was] not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." *Id.* at 807.

Royalty Rates Paid by Government Licensees. The NIH develops inventions that the

government subsequently licenses to third parties. During the licensing process, the government "negotiates" a final royalty rate with licensees. *See Pub. Citizen Health Research Group* v. *NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002). Neither the licenses nor the rates set therein would exist but for government approval.

In *Public Citizen*, 209 F. Supp. 2d 37, the District Court for the District of Columbia held that the negotiated final royalty rate is "obtained from a person" and, therefore, subject to Exemption 4 protection. *See id.* at 44 ("Even though the final royalty rate is arrived at through negotiation, this does not alter the fact that the licensee is the ultimate source of this information."). The court then refused to order disclosure of the negotiated royalty rates, because competitors could use those rates, to the licensee's competitive disadvantage, to "make a rough calculation of [the licensee's] profit margin on a particular drug." *Id.* at 47.

Treasury Bond Issuances. The Treasury Department issues bonds to private entities in order to finance the public debt.

In *Clarke* v. *U.S. Dep't of Treasury*, No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986), the District Court for the Eastern District of Pennsylvania held that "the names and addresses" of a certain type of Treasury bond, along with details concerning "the [bonds'] dollar amount, coupon and maturity date[s]," were "[u]nquestionably . . . obtained from persons outside the government." *Id.* at *2. That ruling enabled the Treasury Department to maintain its "'long tradition of confidentiality of the ownership of United States Treasury securities,'"

breach of which would have enabled market participants to gain a "'significant competitive advantage'" by learning the positions of other bondholders. *Id.* at *3.

Line-Item Pricing in Government Contracts. Agencies, such as NASA and the Department of the Air Force, contract with private parties for the provision of goods or services. In doing so, those agencies may request "the submission of proposed prices for certain contract line items." *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999). The government contract is then subject to "further negotiations on prices and terms." *Id.* Neither the contract nor its specific terms would exist but for government approval.

In *McDonnell Douglas*, the D.C. Circuit concluded that "pricing information contained in a contract" between McDonnell Douglas and NASA was protected by Exemption 4. *Id.* In *Canadian Commercial Corp.* v. *Dep't of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008), the D.C. Circuit likewise observed that negotiated line-item prices between McDonnell Douglas and the Air Force "f[ell] within Exemption 4 of the FOIA if [their] disclosure would 'impair the government's ability to obtain necessary information in the future' or 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Id.* at 40.[12]

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[12] The D.C. Circuit noted, but did not consider, the Government's unpreserved argument that "pricing information is not 'obtained from' a contractor but rather emerges from contract negotiations between the parties." *Id.* at 41 n.*.

(footnote continued)

* * *

The Second Circuit's ruling cannot be reconciled with this line of cases. If the FRBs' "executive action" here—which consisted only of approving Discount Window loans—were enough to eliminate Exemption 4 protection, Exemption 4 protection would be unavailable in these other commercial settings, where the government is typically *more* involved in setting the final terms of the transaction.

Thus, if left to stand, the Second Circuit's ruling would impair numerous federal programs that depend on assuring third parties that details of their commercial transactions with the government will remain confidential. If federal agencies cannot provide these assurances, third parties will turn away from these programs, impairing the programs' effectiveness and the national interests they serve.[13]

(footnote continued)

Subsequently, in a similar case involving unit-pricing information, the District Court for the District of Columbia stated that "the parties agree that the information is 'commercial or financial information obtained from a person.'" *Gen. Elec. Co.* v. *Dep't of Air Force*, 648 F. Supp. 2d 95, 101 (D.D.C. 2009). In doing so, the court noted that, in light of the D.C. Circuit's ruling in *Canadian Commercial*, the Air Force no longer disputed whether "unit pricing information could come within the scope of Exemption 4 at all, regardless of whether [such information] could be shown to be confidential." *Id.* at 101 n.5.

[13] *See Pub. Citizen*, 209 F. Supp. at 53 (crediting affidavit stating that "'licensees will not negotiate with NIH without an expectation that the financial terms of the licenses will remain confidential'"); *Judicial Watch*, 108 F. Supp. 2d at 30 ("[F]oreign

(footnote continued)

B. The Second Circuit's Ruling Contravenes the Established Principle That an Agency May Withhold "Inextricably Intertwined" Exempt and Non-Exempt Data.

The Second Circuit's ruling, if not reviewed by this Court, will impair numerous federal programs. *See supra* at 25-30. It also will wreak havoc on FOIA law by undermining the settled principle, codified in 5 U.S.C. § 552(b), and recognized across the Circuits, that permits an agency to withhold information where it consists of exempt and non-exempt data that are "inextricably intertwined." *See* 5 U.S.C. § 552(b) (requiring agencies to disclose non-exempt information only to the extent that such information can be "reasonably segrega[ted]" from that which is exempt).[14]

(footnote continued)
purchasers may seek financing outside of the United States . . . if subjected to the risk of disclosure of their confidential commercial or financial information."); *Clarke*, 1986 WL 1234, at *2-3 ("releasing the requested information would harm the national interest because investors would be less likely to purchase government bonds in the future"); *Comstock Int'l*, 464 F. Supp. at 808 (crediting "'specific, factual or evidentiary material'" demonstrating, *inter alia*, that disclosure would make loan applicants "unwilling[] to subject themselves to the possible risk of disclosure").

[14] *See also Mead Data Cent., Inc.* v. *U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (agency may withhold non-exempt information if "inextricably intertwined" with exempt information); *Rein* v. *Patent & Trademark Office*, 553 F.3d 353, 374 (4th Cir. 2009) (same); *Missouri Coalition for Envt'l Found.*
(footnote continued)

This rule applies fully here. By any measure, the terms on which banks applied for Discount Window loans existed prior to—and independent of—the loans' approval. In other words, the Reports summarize *both* the information "obtained from" banks, most notably their identities, as even Bloomberg did not dispute below, and the FRB's decision to make loans on those terms. Similarly, the Reports inextricably reflect the terms on which banks accepted Discount Window loans.

Because disclosing the terms on which FRBs approved Discount Window loans necessarily reveals (i) the terms on which each bank *applied* for these loans, and (ii) the terms on which each bank *accepted* these loans, the Reports reflect information "obtained from" the banks that is inextricably intertwined with the information "generated" by the FRBs. Thus, the Reports "contained no reasonably segregable non-exempt information," as the Board explained when detailing its reasons for denying Bloomberg's and Fox's FOIA requests. (*Bloomberg* JA-57; *Fox* JA-30-31.)

(footnote continued)
v. *Army Corps of Eng'rs*, 542 F.3d 1204, 1212 (8th Cir. 2008) (same); *Miccosukee Tribe of Indians of Fla.* v. *U.S.*, 516 F.3d 1235, 1257 n.22 (11th Cir. 2008) (same); *Inner City Press/Community on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006) (same); *Flightsafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003) (same); *Patterson* v. *IRS*, 56 F.3d 832, 840 (7th Cir. 1995) (same); *Church of Scientology Int'l* v. *U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (same); *Andrews* v. *Veterans Admin.*, 838 F.2d 418, 422 (10th Cir. 1988) (same); *Willamette Indus., Inc.* v. *U.S.*, 689 F.2d 865, 867 (9th Cir. 1982) (same).

The Second Circuit's legal conclusion that the information in the Reports was not "obtained from" borrowing banks is thus untenable. It also leads to a result at odds with the statute: Under the Second Circuit's reasoning, Exemption 4 would not apply *even if* disclosure of the Reports would harm the very third parties (here, banks) that Exemption 4 was designed to protect. *See Bloomberg*, 601 F.3d at 150 (acknowledging the "plausible" and "forcefully made" arguments that disclosure of the information sought by Bloomberg would "harm the banks that borrowed"). This conclusion can only be the result of a "nonfunctional" interpretation of the FOIA that fails to give effect to the "reasons for [the] exemption." *John Doe Agency*, 493 U.S. at 157.

II. THE SECOND CIRCUIT OPENLY SPLIT WITH THE D.C. AND FIRST CIRCUITS IN HOLDING THAT EXEMPTION 4 DOES NOT PROTECT "CONFIDENTIAL" INFORMATION WHOSE DISCLOSURE WOULD IMPAIR THE EFFECTIVENESS OF FEDERAL PROGRAMS.

The Second Circuit, creating a conflict with the D.C. and First Circuits, refused to interpret the term "confidential" to include information whose disclosure would impair federal programs. The Second Circuit did so on the erroneous basis that such an interpretation (1) finds "no basis" in the statute and (2) would represent an unbounded expansion of Exemption 4. *See Bloomberg*, 601 F.3d at 150-51.

This split is on an undeniably important question of FOIA law: What is the governing test to

determine whether information is "confidential" within the meaning of Exemption 4, and whether this test allows an agency to withhold information when its disclosure would harm agency programs.

The *National Parks* definition of the term "confidential" is well established and should be endorsed by this Court. *See Contract Freighters, Inc.* v. *Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (observing that "the *National Parks* test" has been "widely recognized and applied by the circuit courts when construing Exemption 4." (collecting authority)). Recognizing that FOIA "contains no definition of the word 'confidential,'" the *National Parks* court looked—properly—to the "legislative purpose" underlying the exemption in order to interpret it meaningfully. 498 F.2d at 767. This approach is fully consistent with this Court's instruction to interpret FOIA exemptions practically, by "looking to the reasons for [the] exemption" and "apply[ing] a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157.

The Second Circuit erred when, though it has long endorsed the *National Parks* interpretation of Exemption 4, *see Cont'l Stock Transfer & Trust Co.* v. *SEC*, 566 F.2d 373, 375 (2d Cir. 1977), it nonetheless refused to read *National Parks* to protect an agency's interest in advancing its programs. The First Circuit rejected just such an "unduly restrictive" interpretation of *National Parks*, recognizing that *National Parks* "identified the two interests which are *most frequently* threatened by the disclosure of

commercial or financial information," but did not impose a rigid limitation "on the number of legitimate interests" which the exemption protects. *9 to 5*, 721 F.2d at 1, 9 (emphasis added).

Instead, the *National Parks* test was designed to protect from disclosure information whose release would harm "an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4." *Id.* at 10. One of these interests is that of the government in withholding information "which would be particularly helpful to agency officials in carrying out their mandate." *Id.* This interest stems directly from Exemption 4's legislative history, in which "the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption." *National Parks*, 498 F.2d at 770 n.17.

The Second Circuit further erred when it reasoned that the program-effectiveness test recognized by the D.C. and First Circuits would "give impermissible deference to the agency." *Bloomberg*, 601 F.3d at 150. This test is nothing like the "vague 'public interest'" standard rejected by this Court, for purposes of Exemption 5, in *Merrill*, 443 U.S. at 354. Unlike Exemption 5, Exemption 4 requires the government to prove that the information sought to be protected, in addition to being "privileged or confidential," is obtained from a third party and is a "trade secret[]" or "commercial or financial" in nature. 5 U.S.C. § 552(b)(4). Those requirements ensure that the test can be invoked only in a *commercial* setting when the government interacts with third parties that supply presumptively sensitive business information in such transactions.

Even in this limited setting, the program-effectiveness test is not toothless. To satisfy this test, the government must still "identify the particular interest [protected by the exemption], and . . . demonstrate how that interest will be harmed by public disclosure of the specific information which has been requested." *9 to 5*, 721 F.2d at 10; *accord Critical Mass*, 830 F.2d at 286. In practice, the government must submit evidence, as the Board did here, showing how disclosure will harm participants in the identified government program—and therefore discourage them from participating in the future—if the requested information is released.[15]

This evidence, moreover, is not something generated *ex post* and subject to agency abuse; it serves as the cornerstone for a confidentiality policy that, as with the Discount Window, is typically in longstanding use.[16]

In all, the program-effectiveness is consistent with *National Parks*' approach to interpreting

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[15] *See, e.g., Clarke*, 1986 WL 1234, at *2-3 (crediting government affidavit demonstrating that market participants "'with access to [bondholder] data concerning the positions of other participants would have a significant competitive advantage'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 (concluding that disclosure of the requested information "would seriously impair [the government's ability] in carrying out its public health responsibilities" (internal quotation marks omitted)).

[16] *See, e.g., Clarke*, 1986 WL 1234, at *3 (crediting government affidavit discussing "'the long tradition of confidentiality of the ownership of United States Treasury securities'"); *Pub. Citizen*, 209 F. Supp. 2d at 53 n.9 (noting that the NIH "takes confidentiality [of royalty information] very seriously because every licensing agreement contains a confidentiality clause").

Exemption 4; fits within the exemption's legislative design; and appropriately balances the public's interest in disclosure against "the needs of the Government to protect certain kinds of information." *John Doe Agency*, 493 U.S. at 157. This Court should therefore grant this Petition in order to provide a definitive interpretation of the term "confidential"—the centerpiece of Exemption 4—that will resolve the existing split in the circuits.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-3795-cv
November 16, 2010

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of November, two thousand and ten.

Before: Dennis Jacobs,
Chief Judge,
Pierre N. Leval,
Peter W. Hall,
Circuit Judges.

FOX NEWS NETWORK, LLC,
Plaintiff-Appellant,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Defendant-Appellee.

ORDER

The Clearing House Association, LLC's motion to intervene in *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve System.* (09-3795-cv) is GRANTED. The issuance of the mandate in *Fox News* will be stayed for seven (7) days from the date of this order to afford The Clearing House Association, LLC an opportunity to file a petition for the Writ of Certiorari to the United States Supreme Court.

FOR THE COURT,

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

Joy Fallek, Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-3795-cv
August 27, 2010

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of August, two thousand ten.

Before: Dennis Jacobs,
Chief Judge,
Pierre N. Leval,
Peter W. Hall,
Circuit Judges.

FOX NEWS NETWORK, LLC,
Plaintiff-Appellant,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Defendant-Appellee.

ORDER

IT IS HEREBY ORDERED that the motion by the Board of Governors for the Federal Reserve System for a 90 day stay of the mandate is GRANTED in part. The issuance of the mandate is hereby stayed for 60 days from the date of this order.

FOR THE COURT,

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

Joy Fallek, Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-3795-cv
August 20, 2010

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand ten.

FOX NEWS NETWORK, LLC,
Plaintiff-Appellant,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Defendant-Appellee.

Board of Governors of the Federal Reserve System having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having consid-

ered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-3795-cv

Argued: January 11, 2010
Decided: March 19, 2010

FOX NEWS NETWORK, LLC,

Plaintiff-Appellant,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,

Defendant-Appellee.

Stephen G. Mintz (Terence W. McCormick, Lisabeth Harrison, Paul Ostensen on the brief), Mintz & Gold LLP, New York, NY, for Plaintiff-Appellant.

Matthew M. Collette (Tony West, Mark B. Stern on the brief), Department of Justice, Washington, D.C.; Yvonne F. Mizusawa (Richard M. Ashton, Katherine H. Wheatley on the brief), Board of Governors of the Federal Reserve System, Washington, D.C., for Defendant-Appellee.

Robert J. Giuffra, Jr., H. Rodgin Cohen, Michael M. Wiseman, William J. Snipes, Patrice A. Rouse, Erez J. Davy, Sullivan & Cromwell LLP, New York, NY, for Amicus Curiae The Clearing House Association L.L.C. in support of Defendant-Appellee.

Melanie Sloan, Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, Washington D.C., for Amicus Curiae Citizens for Responsibility and Ethics in Washington in support of Plaintiff-Appellant.

Before JACOBS, *Chief Judge*, LEVAL and HALL, *Circuit Judges*.

DENNIS JACOBS, *Chief Judge*:

The Federal Reserve System—the central bank of the United States—is composed of twelve regional Federal Reserve Banks and the defendant-appellee Board of Governors of the Federal Reserve System ("Board") in Washington, D.C. The Board is a federal agency that (among other things) supervises the operations of the twelve Federal Reserve Banks.

Plaintiff Fox News Network, LLC, ("Fox News") submitted two Freedom of Information Act ("FOIA") requests to the Board in November 2008. The first sought the names of all the private banks that received loans from the twelve Federal

Reserve Banks (under all of their lending programs) from August 2007 to November 2008, and the collateral the banks provided. The second sought the names of the borrowing banks, the amount they borrowed, and the collateral pledged as to all loans made by the twelve Federal Reserve Banks during September and October 2008. The Board denied these requests in January 2009, noting that while it possessed some responsive records, it was withholding the requested information under Exemptions 4 and 5 of FOIA. During its search for documents responsive to the FOIA requests, the Board determined that it had no information about the collateral used by borrowing banks to secure specific loans, and that such information would be held by the Federal Reserve Bank that made each loan. But since the Board is of the view that the relevant records of the Federal Reserve Banks are not records of the Board, the Board concluded that a FOIA request to the Board did not require the Board to search for them-and no search was conducted.

Fox News brought suit in the United States District Court for the Southern District of New York (Hellerstein, *J.*) to compel disclosure of the Board's documents and a search of documents in the hands of the Federal Reserve Banks. Following cross motions for summary judgment, the district court ruled in favor of the Board, holding both that the records maintained by the Board are properly exempt from disclosure under FOIA Exemption 4, and that the Board was not required to search records maintained by the Federal Reserve Banks. *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F.Supp.2d

384, 394, 401 (S.D.N.Y.2009). The district court's opinion did not discuss Exemption 5, and on appeal the Board argues only the applicability of Exemption 4.

For the reasons stated in the tandem case, *Bloomberg L.P. v. Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 2010 WL 986527 (2d Cir.2010), the information unambiguously at issue in the Fox News requests—the identity of the borrowing bank, the dollar amount of the loans, the collateral securing the loans, and the loan origination and maturity dates—is not protected from disclosure by Exemption 4. The Board is therefore required to disclose responsive records it had previously deemed exempt; we vacate the district court's judgment and remand to the district court to order the Board to disclose the previously withheld responsive information.

Still at issue is whether the Board adequately searched its records and the records of the twelve Federal Reserve Banks in response to these FOIA requests. Fox News argues that: (1) the Board was required to search the loan records of each of the twelve Federal Reserve Banks, and (2) the Board misconstrued Fox News's FOIA requests in the Board's search of its own records.

As the district court concluded, not all lending records of the twelve Federal Reserve Banks necessarily become records of the Board. However, Board regulations provide that some records at the Federal Reserve Banks—those kept at the Federal Reserve Banks under certain conditions for "administrative reasons"—are records of the Board; these must be searched. We remand to the district court to order further searches and to

determine if the fruits of those searches must be disclosed. The district court did not reach the question of whether the Board misconstrued the scope of the Fox News FOIA requests (the district court having ruled these documents would be exempt from disclosure in any instance); we remand for further consideration of that question as well.

I

Barring a relevant exemption, an agency must disclose responsive "agency records" in order to comply with a FOIA request. *See* 5 U.S.C. § 552(a)(4)(B); *see also Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994). Fox News argues on appeal that all of the lending records of the twelve Federal Reserve Banks are "agency records" of the Board within the scope of FOIA. *See* 5 U.S.C. § 552(a)(4)(B). Materials are agency records under FOIA if: (1) the agency created or obtained the relevant records, and (2) the agency is in control of the documents at the time of the FOIA request. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989). Under the Board's regulations, "[t]he Secretary of the Board . . . is the official custodian of all Board records, including records that are in the possession or control of the Board, any Federal Reserve Bank, or any Board or Reserve Bank employee." 12 C.F.R. § 261.3(a). Since the Board is the "custodian" of "Board records" that are in the hands of the Federal Reserve Banks, such records must be searched by the Board pursuant to FOIA. It remains to be

determined which Federal Reserve Bank records are "Board records" that the Board must search.

Fox News argues that the responsive loan records are among those records held at the Federal Reserve Banks that are also records of the Board. By regulation, records of the Federal Reserve Banks become records of the Board when they are created pursuant to the "performance of functions for or on behalf of the Board" or when they "are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1)(i-ii). (The full text of the regulation is set out in the margin).[1]

A declaration submitted by the attorney for the Board in charge of processing FOIA requests states that the Board interprets the qualifier "for or on behalf of the Board" to describe a function performed by the Federal Reserve Bank "under delegated authority from the Board." Supp. Decl. of Alison M. Thro ¶ 3. The Board cites no written or published expression of this internal policy or interpretation, or any prior application of it. It is

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[1] "Records of the Board include . . . all information coming into the possession and under the control of the Board, any Board member, any Federal Reserve Bank, or any officer, employee, or agent of the Board or of any Federal Reserve Bank, *in the performance of functions for or on behalf of the Board* that constitute part of the Board's official files; or [records] *[t]hat are maintained for administrative reasons in the regular course of business in official files in any division or office* of the Board or any Federal Reserve Bank in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1) (i-ii) (emphases added).

therefore uncertain how much deference it commands or deserves.

In any event, it seems clear from the statutory scheme that enacted the Federal Reserve System that the lending activities of the Federal Reserve Banks do not take place "on behalf of" or under the "delegated authority" of the Board. The Board itself has no power to make a loan to any bank, and does not authorize each loan made by the Federal Reserve Banks. The power to make loans is explicitly granted by statute only to the Federal Reserve Banks themselves. 12 U.S.C. § 347b(a). In that way, "Congress divided the powers of the Federal Reserve System between the Board, which is a federal agency, and the [Federal Reserve Banks], which were established as regional banks .... The Federal Reserve [System] is structured to empower local institutions to lend, while permitting federal oversight." *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F.Supp.2d 384, 396 (S.D.N.Y.2009). "It is evident from the legislative history of the Federal Reserve Act that Congress did not intend to give the federal government direction over the daily operation of the [Federal] Reserve Banks." *Lewis v. United States*, 680 F.2d 1239, 1241 (9th Cir.1982). Since the Board neither issues nor authorizes the specific loans that Fox News seeks documentation of, we agree that the Federal Reserve Banks did not issue each loan on "behalf of the Board," or under the "delegated authority" of the Board.[2]

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[2] Judge Leval does not concur in this paragraph. In his view, it is unnecessary to answer in this appeal whether lending by the Federal Reserve Banks is done "for or on behalf of" the Board. Fox News has made clear that all it

However, "Records of the Board" also include such records that "are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1)(ii). The Board argues briefly that it interprets this regulation as well to include only those records created "under delegated authority from the Board." This interpretation does not withstand scrutiny. The context and phrasing of the regulation gives no support for the proposed limitation. As the district court held in *Bloomberg*—without appeal from the Board on that point—this regulation provides that certain records of the twelve Federal Reserve Banks are records of the Board and those records must be searched. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F.Supp.2d 262, 274 (S.D.N.Y.2009).

To fully comply with the Fox News FOIA requests, the Board must search records of the twelve Federal Reserve Banks that are maintained for administrative reasons, in the regular course of business, in the Board's official files or by any Federal Reserve Bank, and in connection with the transaction of any official business. And responsive documents identified in that search

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seeks in its FOIA demand is the identifies of the borrowing banks and the terms of the loans. All such information will be contained in records "maintained for administrative reasons in the regular course of business in official files in . . . [a] Federal Reserve Bank." Accordingly all the information in the Federal Reserve Banks that is sought in this case is contained in documents which are subject to production by the Board.

must be produced unless shielded by some FOIA exemption. We remand to the district court to order the Board's further searches and to determine if the results of those searches must be disclosed.

II

Fox News also argues that the Board improperly narrowed the scope of its FOIA requests with regard to collateral pledged by borrowing banks. According to Fox News, it requested not only collateral associated with specific loans (which is held only by the Federal Reserve Banks), but also general collateral information (which is held by the Board itself).[3] The Board claims that while it possesses some general information of this sort—such as the collateral that depository institutions have on deposit in "pledge accounts," which is eligible to be posted as collateral for a Discount Window loan—it does not believe such information was within the scope of the Fox News requests. The Board argues that it properly interpreted the requests to seek only specific collateral pledged for specific loans. That information is held only at the Federal Reserve Banks.

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[3] The first Fox News request initially sought, in relevant part, "an accounting of the collateral provided by these [borrowing] institutions in exchange for lending." This request was later arguably broadened to "seek[ ] an accounting of the collateral provided by these [borrowing] institutions"—a formulation that is less transaction specific. The second Fox News request sought, in relevant part, "records sufficient to identify all collateral pledged by each . . . institution" that "participated in any Fed[eral Reserve System] lending program."

This issue was not decided below because the district court ruled categorically that collateral information is protected from disclosure by Exemption 4. It is unclear if such general collateral information was requested, or whether, under *Bloomberg L.P. v. Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 2010 WL 986527 (2d Cir.2010), such information could be withheld. We decline to decide these questions in the first instance and remand to the district court for judgment on this point consistent with our opinion.

CONCLUSION

We vacate the district court's judgment for the foregoing reasons and those stated in the tandem case, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 2010 WL 986527 (2d Cir.2010). We remand to the district court to order the Board's further disclosure and further searches, and to determine if what is discovered in further searches must be disclosed. We also remand to the district court for initial consideration as to whether the Board properly construed the scope of the FOIA requests and searched its own records in response, and whether materials that may be found must be disclosed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

No. 09 Civ. 272 (AKH)
July 30, 2009

FOX NEWS NETWORK, LLC,

Plaintiff,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.

Steven Glen Mintz, Terence William McCormick, Paul Ostensen, Mintz & Gold LLP, New York City, NY, for Plaintiff.

Yvonne Facchina Mizusawa, Board of Governors of the Federal Reserve System, Washington, DC, for Defendant.

OPINION AND ORDER SUBSTANTIALLY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ALVIN K. HELLERSTEIN, *District Judge*:

In the summer of 2007, responding to a weakening national economy, the Board of Governors of the Federal Reserve System ("the Board") took steps to provide much-needed liquidity to American companies in search of funds. One major step was to authorize the regional Federal Reserve banks to issue loans at terms more favorable than had been their longstanding practice.

Typically, the twelve regional Federal Reserve Banks ("FRBs") used their Discount Window to make overnight loans to eligible depository institutions in their respective districts, as loans of "last resort."[1] As a temporary measure in August 2007, the FRBs reduced the rates for money lent through the Discount Window and lengthened the loan terms from overnight to as long as ninety

[1] Until 2003, because the rate was lower than the target rate set by the Federal Reserve, borrowers had to show that they had no other available source of borrowed money before being permitted to borrow at the Discount Window. Since then, no such showing has been required because the Discount Window rate is set higher than the target rate. Thus, one might expect that "institutions will use the Discount Window as a backup rather than a regular source of funding," The Federal Reserve Discount Window, http://www.frb discount window.org/ discount window book.cfm, or, more likely, when the liquidity needs of a financial institution cannot be met by its regular sources of funding.

days. When the Board found that liquidity still did not sufficiently improve, it authorized the FRBs, in March 2008, to lend to additional entities, including primary dealers, "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates," 12 U.S.C. § 225a. The amount of money lent through the Discount Windows at the twelve regional FRBs increased dramatically, from an average of approximately $1 million during the week of August 8, 2007, to over $188 billion in the last week of 2008. Pl. Memo 5.

Plaintiff Fox News Network ("Fox") is owner of Fox Business Network, a cable news network. Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2006), Fox seeks disclosure of borrowers' names, loan amounts, and pledged collateral for the loans made under these new programs. Fox argues that because taxpayer dollars are being dispersed to particularly troubled institutions in economically perilous times, via untested and unprecedented methods, the public deserves transparency and the Federal Reserve requires increased oversight.

The Board resists disclosure under FOIA, maintaining that it already voluntarily releases broader, aggregate information regarding these lending facilities and that releasing transaction-level information would jeopardize the success of the facilities. The Board argues that since the public has long regarded the Discount Window as providing mainly "loans of last resort" (along with routine needs by stable banks for short-term funds) publicizing this information would deter borrowers from using the Discount Window, and

might induce depositors and investor to make panicky withdrawals from financial institutions that borrowed from a Federal Reserve bank's Discount Window. If the court grants disclosure and those dangers follow, great damage to the national economy would result.

Fox submitted to the Board two requests, pursuant to FOIA. The Board conducted a search, compiled and reviewed the responsive materials, and replied that all the documents that Fox had sought were exempted from required disclosure rules under two exemptions of the Act, Exemptions 4 and 5. 5 U.S.C. § 552(b)(4), (5). Both parties move for summary judgment.

I rule that one document, which the Board determined is not a record, is indeed, a record. The Board shall identify this document and either produce it or claim an exemption. In all other respects, I grant the Board's motion and deny Fox's motion, finding that the Board performed an adequate search and that Exemption 4 permits the Board not to disclose the documents that Fox seeks.

I. History of the Federal Reserve

The tension between federal power and states' rights, which so fundamentally shaped our bicameral legislature, the electoral college, the limited jurisdiction of our federal courts, and other aspects of the United States Constitution, also is reflected in the national banking system: whether to focus national monetary policy and power in one or a few national banks, or to rely on the banking systems of each state. Alexander Hamilton, the first Secretary of the Treasury, founded

the First Bank of the United States in 1791. The bank was a private company, created to service commercial and private needs, but empowered also to issue a national currency, receive tax payments due to the United States, and monetize and manage the national debt. The wealth it possessed combined with its ties to the federal government led to the bank's rapid growth in national wealth and power. However, the bank was opposed by Thomas Jefferson and his Democratic-Republican party who distrusted centralized federal power and favored state banking systems.[2]

Congress let the bank's charter lapse twenty years after it was founded. A profusion of state-chartered banks arose to succeed to the functions that the national bank had performed. The state banks, with their powers to lend and to issue currency, created a great spread of wealth, run-away inflation, financial panic, and economic chaos. In 1816, to return the nation to solvency and stability, President James Madison signed into law a Second Bank of the United States with larger capitalization than the First Bank. Denounced by President Andrew Jackson and his Democratic party, the Second Bank suffered the same fate as the first when its charter was allowed to lapse in 1836, and again was succeeded by state banks, easy money, multiple issues of currency, a spread of wealth, inflation that surpassed bounds, and financial chaos, which ushered in the Panic of

[2] *See generally* Alan Brinkley, The Unfinished Nation: A Concise History of the American People 161-65 (2d ed., McGraw-Hill 1997); Harry J. Carman & Harold C. Syrett, A History of the American People 229 (Alfred A. Knopf 1952).

1837.[3] Again, the nation rescued itself by an increased centralization of banking functions and tighter regulations through the National Banking Act of 1863, and its subsequent amendments in 1864 and 1865, which chartered myriad smaller national banks and created a national currency. This legislation enabled the North to fund and equip the armies that won the Civil War.[4] However, these measures were insufficient to establish a truly centralized banking system. Once again, the federal system declined and was eclipsed by the state-chartered banks, leading again to runaway inflation and a succession of financial panics culminating in the Panic of 1907.[5]

The fluctuations and compromises continue until today between a central national bank, a central bank mediated by partially autonomous regional banks, and numerous state banks. The current system owes its origin to the Federal Reserve Act of 1913 ("FRA"), which capped the federal reform effort that followed the Panic of 1907.[6] The FRA, signed into law by Woodrow Wilson, created a number of substantially

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[3] *See* Brinkley, *supra* note 2, at 210-11, 222-23, 249-52, 256-57, 259; Carman & Syrett, *supra* note 2, at 352.

[4] *See* Carman & Syrett, *supra* note 2, at 627; Roger T. Johnson, Historical Beginnings . . . The Federal Reserve 10-12 (Public and Community Affairs Department, Federal Reserve Bank of Boston 1999).

[5] *See* Johnson, *supra* note 4, at 12-15; Robert F. Bruner & Sean D. Carr, The Panic of 1907: Lessons Learned from the Market's Perfect Strom 1-7 (John Wiley & Sons, Inc. 2007).

[6] *See* Bruner & Carr, *supra* note 5, at 141-51.

autonomous regional banks and a federal board of governors, in charge of oversight and federal policy.[7] The FRBs were to be "the monetary and fiscal agents of the United States." *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 277 (3rd Cir.2006) (quoting *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 356, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968)).

The FRA provided that three government officials, the Secretaries of Treasury and Agriculture and the Comptroller of the Currency, would select the number of regional districts, draw the district boundaries, and choose the city within each district in which the bank would be located. Controversy surrounded the number of regional banks and the size and reach of the New York branch. Other areas were concerned that a system so firmly rooted in New York City would not be sympathetic or attuned to their local needs, including the financial demands peculiar to the regional manufacturing and agricultural industries. Congress instructed that "the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States." FRA § 2(1). In the end, by selecting a relatively large number of regions (twelve) each with a federal bank, and by intentionally curbing the power of the New York Federal Reserve branch, the three officials insured that institutions throughout the country might have access to federal funds from a receptive regional lender.[8]

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[7] *See* Brinkley, *supra* note 2, at 621-22, 705; 2 Carman & Syrett, *supra* note 2, at 385, 524.

[8] *See* Johnson, *supra* note 4, at 16-37.

The 1913 House Currency and Banking Committee Report, issued in conjunction with the Federal Reserve Act and expressing congressional intent, comments that the FRBs are "individually organized and individually controlled, each holding the fluid funds of the region in which it is organized and each ordinarily dependent upon no other part of the country for assistance." H.R.Rep. No. 69 63rd Cong., 1st Sess. 18 (1913). The FRA requires each FRB, through its individual board of directors, to:

> administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and may, subject to the provisions of law and the orders of the Board of Governors of the Federal Reserve System, extend to each member bank such discounts, advancements, and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks, the maintenance of sound credit conditions, and the accommodation of commerce, industry, and agriculture.

12 U.S.C. § 301. The twelve regional banks are "operating arms of the central banking system," but at the same time substantially independent and autonomous. The Federal Reserve System Purposes and Functions, 6 (9th ed., June 2005).[9]

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[9] The Federal Reserve System Purposes and Functions is a Board publication upon which courts have relied to explain the workings of the Federal Reserve. *See Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 343 n. 2, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979).

They are charged with carrying out "system functions including operating a nationwide payments system, distributing the nation's currency and coin, supervising and regulating member banks and bank holding companies, and serving as banker for the U.S. Treasury." *Id.* Each bank acts "as a depository for the banks in its own district," "a lender to eligible institutions . . . , and a clearing agent for checks." *Id.* at 6, 11. The FRBs turn all their profits over to the Department of Treasury, *id.*, and they operate, in part, under independent grants of Congressional authority. *See, e.g.*, 12 U.S.C. § 341 (providing the power to sue and be sued, make contracts, appoint officers, hire and fire employees, prescribe by laws). However, they are managed by their own boards of directors, with two-thirds majorities elected by the banks in their regions, and enjoy considerable autonomy with regard to their lending and deposit policies, as long as they are not inconsistent with the general propositions of national policy and oversight.

The Board, in contrast to the FRBs, is a government agency composed of seven members, appointed by the President and confirmed by the Senate, and a staff. 12 U.S.C. § 241. The Board may examine and report upon the FRBs' activities, suspend or remove any FRB officer or director, require the FRBs to write off losses, oversee loans between FRBs, supervise the FRBs, and issue rules and regulations for the FRBs. 12 U.S.C. § 248(a)-(r). The Board "exercises broad responsibility over the nation's payments system . . . and plays a major role in supervision and regulation of the U.S. banking system." *See* 12 U.S.C.

§ 248(j). However, the degree of supervision and control by the Board is a function of the personalities at play and any current issues between Congress and local banking interests. All this is done in a tension with local powers and practices exercised by the twelve regional banks and the member banks that they serve.

II. Procedural History

On November 10, 2008, Fox's Vice President Bruce Becker submitted a FOIA request to the Board, pursuant to 5 U.S.C. § 552, seeking "the names of institutions receiving Federal Reserve lending from programs including but not limited to the following: Regular [Open Market Operations ("OMO")]; Single-Tranche OMO Program; Discount Window; Term Discount Window Program; Term Auction Facility; Primary Dealer Credit Facility; Transactional Credit Extensions; ABCP Money Market [Mutual Fund] Liquidity Facility; Securities Lending; Term Securities Lending Facility; Term Securities Lending Facility Options Program; and any other Federal Reserve lending facility not mentioned above," for the time period of August 8, 2007 through November 17, 2008.

On November 18, 2009, Fox's Executive Vice President Kevin Magee filed a second FOIA request before Fox had received any response from the Board. The second request sought records from September and October 2007 that identify the names of the institutions that had received loans under the programs listed in the first FOIA request, as well as the loan amounts and collateral pledged. The second request included an

application for expedited processing, under 5 U.S.C. § 552(a)(6)(E)(v)(II).

In response to the two requests, the Board conducted a search of its records and engaged in discussions with its FRBs. The Board located 6,186 pages of agency records responsive to Fox's requests. The information contained in these pages related to the names and loan amounts of Discount Window borrowers and other programs mentioned in the requests. The Board found little information regarding collateral. After reviewing the responsive material, the Board determined that all the documents contained exempt material and no reasonably segregable non-exempt information. The Board denied the requests under Exemptions 4 and 5, and, on February 19, 2009, filed two indices pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973) and supporting declarations. The Board represented that the bulk of the documents Fox sought were records of the FRBs in New York and Boston, and that records of an FRB are not records of the Board, as defined by the Federal Reserve Act, and do not have to be produced by the Board.

On March 27, 2009, the Board moved for summary judgment, arguing that no records have been improperly withheld and that it is entitled to judgment as a matter of law. Fox cross-moved, arguing that (1) the Board conducted an inadequate search, in part because it failed to search FRB records, and (2) no exemptions apply to the records. Alternatively, Fox seeks discovery, asserting that the Board has demonstrated bad faith in conducting the search.

III. Discussion

A. Relevant Law

Congress enacted FOIA "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill,* 443 U.S. 340, 351-52, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979) (citing S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). There are nine exclusive exemptions listed in § 552(b). "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and each exemption "must be narrowly construed." *Dept. of Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).

Summary Judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On a motion for summary judgment in a FOIA case, "the agency must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 890 (D.C.Cir.1995) (internal quotations and citations omitted). The agency also "must demonstrate that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Ruotolo v. Dep't of Justice, Tax Div.,* 53 F.3d 4, 9 (2d Cir.1995).

The agency will sustain its burden by showing, through "affidavits or declarations, . . . that the agency has conducted a thorough search for responsive documents and has given reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 812 (2d Cir.1994). The burden of proof rests with the agency on all material issues related to the search's adequacy and the merits of exemptions. 5 U.S.C. § 552(a)(4)(B). Affidavits submitted by an agency are "accorded a presumption of good faith." *Carney,* 19 F.3d at 812. In a FOIA case, the government agency is not entitled to the deference generally given under the Administrative Procedure Act, and the district court should review the agency's decision de novo. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 755, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

"Discovery relating to [an] agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face." *Carney,* 19 F.3d at 812, demonstrating "that the withheld information is clearly exempt and contains no segregable, nonexempt portions." *Allen v. CIA,* 636 F.2d 1287, 1298 (D.C.Cir.1980), *overruled on other grounds by Founding Church of Scientology of Washington D.C., Inc. v. Smith,* 721 F.2d 828 (D.C.Cir.1983). "Where the agency fails to meet that burden, . . . the court may employ a host of procedures that will provide it with sufficient information to make its de novo determination, including . . . discovery by the plaintiff." *Id.* If the agency satisfies its burden, the plaintiff must then

demonstrate the agency's bad faith by "impugn[ing] the agency's affidavits or declarations, or provid[ing] some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate." *Carney*, 19 F.3d at 813 (citation omitted). Failing that, the court has the discretion to "forgo discovery" to corroborate the agency's claims and grant summary judgment in favor of the agency. *Id.* at 812

B. Adequate Search

A court must determine whether an agency has adequately searched its records prior to analyzing claims of exemption. *See Carney*, 19 F.3d at 812. " 'The factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.' " *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir.1999) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C.Cir.1991)). However, "if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Founding Church of Scientology of Wash., D.C., Inc. v. NSA*, 610 F.2d 824, 837 (D.C.Cir.1979).

The Board has successfully carried its burden of showing that it performed an adequate search. Alison M. Thro, an attorney for the Board, was responsible for processing Fox's two FOIA requests. She has ten years of experience processing FOIA requests for the Board, five of those years as its attorney in charge of such processing requests. Ms. Thro submitted a declaration detail-

ing the Board's general procedure for handling FOIA requests and outlining her processing of Fox's requests.

Not long prior to receiving Fox's requests, the Board had received and processed nineteen different FOIA requests regarding substantially overlapping information about Discount Window lending and Special Credit and Liquidity Facilities transactions, and it relied on this work in processing Fox's requests. In processing the first nineteen requests, Thro had "contacted staff members in the two divisions of the Board most likely to have responsive records." Thro Decl. ¶ 10. These two divisions, the Division of Monetary Affairs and the Division of Reserve Bank Operations and Payment Systems, are the only departments charged with overseeing the Reserve Banks' lending under the relevant facilities and supplying "data and statistics to the Board . . . relating to" those facilities. Thro Decl. ¶ 22. Thro and her staff contacted numerous senior and other staff members at each division and discussed previous FOIA requests in an effort to compile responsive documents. In total, thirteen staff members cooperated with the legal team. Based on discussions with the staff members, Thro concluded that it was not reasonably likely that responsive documents were kept in any other divisions of the Board. Thro and her staff then had follow-up discussions with six of the staff members to confirm that all appropriate documents had been searched.

In response to Fox's FOIA requests, the Board's legal staff reviewed documents it had compiled while processing the many earlier requests, locating 6,008 pages of responsive documents. Thro

made further inquiries, including to the same two departments, speaking with several staff members, seeking any remaining responsive information. These conversations led Thro to 178 additional pages of responsive documents. In all, Thro found 6,186 responsive pages of documents, all of which the Board believed to be exempt from disclosure under Exemptions 4 and 5.

Fox argues that the Board's submissions reveal "positive indications of overlooked materials," precluding a finding of summary judgment in the Board's favor, *Founding Church of Scientology of Wash., D.C., Inc. v. NSA*, 610 F.2d at 837, and entitling Fox to summary judgment because of the inadequate search, *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F.Supp.2d 28, 46 (D.D.C.1998). Alternatively, Fox asks for discovery to test the competency of the Board's search. *Carney*, 19 F.3d at 812.

I hold that Thro's methodology was reasonably calculated to identify all responsive documents.

1. Federal Reserve Bank Records

Fox argues that the Board failed adequately to search its records because it did not search records of the New York Federal Reserve Bank ("FRBNY") and the Boston Federal Reserve Bank ("FRBB"), the instrumentalities that made the Discount Window loans. The Board responds that it is not required to search files maintained by the FRBs, for the FRBs' records are not the Board's records and, thus, the Board is under no obligation to search them. *Jone-Edwards v. NSA*, 196 Fed.Appx. 36, 38 (2d Cir.2006) ("An agency is not obliged to conduct a search of records outside its

possession or control." (citing *Grand Cent. P'ship*, 166 F.3d at 479)); *see Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144-45, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989) (finding agency records are those (1) created or obtained by the agency and (2) under the agency's control "at the time of the FOIA request").

The Board maintains that it has consistently interpreted its regulations to require search only of records generated by the Board, or by other entities performing a function on behalf of the Board. One regulation provides:

> Records of the Board include . . . all information coming into the possession and under the control of the Board, any Board member, any Federal Reserve Bank, or any officer, employee or agent of the Board or any Federal Reserve Bank, in the performance of functions for or on behalf of the Board that constitutes part of the Board's official files.

12 C.F.R. § 261.2(i)(1)(i). The Board interprets the words "for or on behalf of the Board" to mean "under delegated authority from the Board." Thro Supp. Decl. ¶ 3. This "longstanding practice of the Board," in interpreting its own regulations, *id.*, " 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 207 (2d Cir.2006) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)).

The FRA, which established the FRBs, grants independent authority to the FRBs to lend at the Discount Window and determine required collat-

eral. 12 U.S.C. § 347b(a) ("Any Federal Reserve bank, under rules and regulations prescribed by the Board . . . , may make advances to any member bank on its time or demand notes having maturities of not more than four months and which are secured to the satisfaction of such Federal Reserve bank."). The Board promulgates general rules and regulations, but lacks the statutory authority to lend. Thus, it cannot delegate lending authority to the FRBs. Because the FRBs lend money pursuant to their own mandate, records of their lending are not Board records. Indeed, the five required forms that a borrower completes when applying for a loan at an FRB Discount Window indicate that the loan is from the FRB and not the Board. These forms make no mention of the Board, only of the relevant FRB.[10]

The history and structure of the Federal Reserve, the Board, and the FRBs, bolster the Board's statutory interpretation. In the FRA, Congress divided the powers of the Federal Reserve System between the Board, which is a federal agency, and the FRBs, which were established as regional banks. Premised on this division, the Board interprets the statutory definition of its records.

The Federal Reserve is structured to empower local institutions to lend, while permitting federal oversight. The Board has the authority to promulgate the rules and regulations to which the FRBs must adhere. But, this authority does not suggest that loans made by an FRB, acting under

[10] Forms available at:http:// www. frb discount window. org/ required. cfm.

its own authority and discretion, are done on the Board's behalf. "It is evident from the legislative history of the Federal Reserve Act that Congress did not intend to give the federal government direction over the daily operation of the Reserve Banks." *Lewis v. U.S.*, 680 F.2d 1239, 1241 (9th Cir.1982) ("[T]he reserve-bank plan retains to the Government power over the exercise of the broader banking functions, while it leaves to individuals and privately owned institutions the actual direction of routine." (citing H.R. Report No. 69, 63 Cong. 1st Sess. 18-19 (1913))).

Fox argues that the FRBs act on the Board's behalf when they implement the monetary policy that the Board's regulations permit, and that records generated by the FRB in connection with the facilities are Board records. However, to read the statute as defining all FRB records as Board records goes against the fundamental importance of an FRB's autonomy, autonomy which was the cornerstone of the Federal Reserve System's success.

The Board interprets other relevant regulations consistently with this reading. The record-keeping regulation for the Board provides: "Records of the Board include . . . [records] maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1)(ii). It provides that the Board may store its records off-site in the FRBs only "for administrative reasons." *Id.* Thus, not all records kept by the FRBs are records of the Board; only those reflecting delegated functions or those held

at an FRB for the Board's "administrative reasons."

Section 261.3(a) provides that the Secretary of the Board is the custodian of its records, whether maintained at the Board or in an FRB. This regulation provides: "The Secretary of the Board . . . is the official custodian of all Board records, including records that are in the possession or control of the Board, any Federal Reserve Bank, or any Board or Reserve Bank employee." Plaintiff argues that this establishes that the Board's Secretary, and therefore the Board, has custody or control over all records kept by all FRBs. However, as the Board maintains, this provision does not extend the functions or powers of the Board's Secretary beyond the limits of § 261.2(i)(1)(i).

Congress established the Board and the regional FRBs as separate entities, reflecting the tension between a centralized federal bank and generally independent state and local banks. The Board establishes national policy, but that policy is implemented by each FRB, which maintains its own banking relationship with the member banks of its region. The Board's interpretation of which records belong to the Board and which belong to the FRBs is consistent with the overall Federal Reserve System structure established by statute.

Although the Board has the power "[t]o examine at its discretion the accounts, books, and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary," 12 U.S.C. § 248(a), that oversight power does not change the balance of the record-keeping functions described above. In any event, for purposes of FOIA, what an

agency has an ability to obtain, but has not obtained, is irrelevant. *Forsham v. Harris*, 445 U.S. 169, 182, 185, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) ("FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained"); *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 531 (S.D.N.Y.1977) (holding that agency "should not be compelled to acquire data it neither referred to directly nor relied upon in making decisions").

It may be, as Fox argues, that no FRB has a FOIA office to which FOIA requests may be submitted, that the only FOIA office for the Federal Reserve System is in the Board, and if Fox cannot obtain documents from the Board, it will be deprived of obtaining any meaningful documents enabling a public accounting of the Board's Discount Window loan program. Whether or not this is so, it does not alter the fact that Fox served its requests only upon the Board and that the definition of a Board record is limited by statute.

I hold that the Board's interpretations of its own regulations are reasonable and consistent. I reject Fox's argument that the interpretations are unreasonably narrow and attenuated.

2. Additional Arguments for Inadequate Search

Fox argues that additional aspects of the Board's search cause it to be inadequate. Fox argues that the Board failed to account for records obtained from the FRBNY and the FRBB in the "daily data feed" from which the Board generates its own reports; that the Board did not search deleted files for responsive material; and that the

Board chose not to search an attachment to a received e-mail that the recipient of the e-mail had not and need not have opened.

The daily data feeds are daily reports sent electronically by the individual FRBs to the Division of Monetary Affairs containing aggregate data pertaining to FRB transactions. The Board generates three different weekly reports from the data, and searched its weekly reports to respond to Fox's FOIA request. Fox charges that the daily data feeds may have contained information that was not incorporated into the Board's weekly reports and that the Board never searched the unincorporated information.

Fox has no proof that any data was left out of the Board's three weekly reports. The good-faith presumption accorded to agency affidavits "cannot be rebutted by 'purely speculative claims about the [possible] existence . . . of other documents.'" *Grand Cent. P'ship*, 166 F.3d at 489 (quoting *Safe-Card Servs., Inc.*, 926 F.2d at 1200); *Carney*, 19 F.3d at 813 ("something more than [movant's] bare allegations" of agency's concealment of records is required). The daily reports themselves are dynamic, the data changing with each day's business, and the Board does not retain hard copies of each generation. To require the Board to reconstruct the daily data feeds as of particular dates would be unduly burdensome. *Grand Cent. P'ship*, 166 F.3d at 489 ("an agency's search need not be perfect, but rather need only be reasonable"); *Schrecker v. Dept. of Justice*, 349 F.3d 657, 663 (D.C.Cir.2003) (The "adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of

the case."); *see Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 27 (D.D.C.2000) ("[I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome . . . . The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.") (quotation and citation omitted).

As to deleted material, the issue arises with regard to two Board members and one staff member who had received weekly reports via e-mail containing transaction-level loan information. None of these three individuals had used the reports to perform Board duties and had routinely destroyed all copies prior to Fox's FOIA request. *Id.* The Board's failure to use computer experts to search for these files does not render the search inadequate. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C.Cir.2006) (agency's FOIA response sufficient when its explanation as to why it was unable to recover deleted emails was adequate and unrebutted). The personnel routinely deleted such emails shortly after receiving them because they did not need this information to perform Board duties. *See Wilbur v. CIA*, 355 F.3d 675, 678 (D.C.Cir.2004) ("the fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records"); *Yeager v. DEA*, 678 F.2d 315, 321 (D.C.Cir.1982) ("A requester is entitled only to records that an agency has in fact chosen to create and retain.").

3. The Unopened Attachment

In one instance, the Board did not search an attachment to an e-mail received by a number of Board staff and Board members within the relevant time period. The recipients had opened the e-mail which contained responsive aggregate information from the FRBNY regarding a relevant lending facility. None of the recipients opened the attachment until Thro asked them to do so as part of the search. Thro determined that because the attachment had not been opened, forwarded, used, reviewed, or relied upon in the course of the recipients' duties for the Board, it was not a Board record. I disagree.

The attachment was both obtained by the agency and within the agency's control "at the time of the FOIA request." *Dept. of Justice*, 492 U.S. at 144-45, 109 S.Ct. 2841. It was kept and not deleted. *Yeager*, 678 F.2d at 321. That no staff or Board member thought to open the attachment does not negate its status as a record. Documents, and their attachments, are records whether or not an employee's eye passed over every section or page.

I hold that the attachment is an agency record and should be included in the search. Thro's decision, however flawed, was forthrightly presented in her declaration and is not evidence of "bad faith." *Allen*, 636 F.2d at 1298. Fox's submissions are "adequate on their face," *Carney*, 19 F.3d at 812, regardless, and provide sufficient information on which to make a de novo determination. *See id.* at 813. The Board shall conduct the additional search, turn over all responsive and non-exempt

information, and submit an additional Vaughn index, if necessary.

In spite of this deficiency, the search conducted by the Board was thorough and reasonable. The Board searched the two divisions reasonably likely to have responsive documents (based on its nineteen prior similar FOIA requests). The Board contacted thirteen staff members and had follow-up discussions with six. The Board's FOIA attorney personally reviewed the information. This process yielded 6,008 pages of exempt information listed on the Feb. 19, 2009 Vaughn indicies. A later, additional search yielded 178 more pages listed on supplemental Vaughn index. I find that the search was adequate, no additional search (other than that indicated above) is required, and no discovery by Fox of the Board's review process is warranted.

C. FOIA Exemptions

The Board argues that Exemptions 4 and 5 exempt the responsive documents recovered in the search. Exemption 4 applies to an agency's commercial, financial, or trade secret information that is obtained from a person and is privileged or confidential. 5 U.S.C. § 552(b)(4). Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). I hold that Exemption 4 applies and, thus, do not discuss whether Exemption 5 applies.

Under Exemption 4, an agency must demonstrate that the information sought is: (1) a "trade secret" or "commercial or financial" in character, (2) "obtained from a person," and (3) "privileged or

confidential." 5 U.S.C. § 552(b)(4); *Inner City Press/Cmty. on the Move v. Bd. of Governors*, 463 F.3d 239, 244 (2d Cir.2006). The parties agree that the loan information sought is "commercial or financial," but dispute the other two elements.

1. Obtained from a Person

Documents within the scope of Exemption 4 must be "obtained from a person." 5 U.S.C. § 552(b)(4). For the purposes of FOIA, a " 'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). An "agency" includes, inter alia, a "Government corporation [or] Government controlled corporation." 5 U.S.C. § 552(f)(1). Fox wants the Board to disclose documents containing the borrowers' names, loan amounts, and pledged collateral for all the loans made through the Discount Window and related facilities. The Board contends that the information that Fox seeks originated with and was obtained by an FRB, from a borrower, and therefore was "obtained from a person." Fox argues that the information is obtained by the Board from the FRBs, and that the loan information is generated by the federal government, and does not implicate raw information received directly from the borrower. *See Nadler v. FDIC*, 899 F.Supp. 158, 164 (S.D.N.Y.1995) ("The thrust of the FOIA is to create a right of access to official information. Information generally acquires an 'official' character either when it is generated by the agency itself or is acquired from private parties whose activities are substantively germane to the agency's 'official' mission.").

Exemption 4 aims squarely at protecting the rights of individuals over their privileged or confidential commercial information against FOIA's broad sweep. In recognizing this, courts look past formalities to ensure that even indirect disclosure does not jeopardize a person's privacy. One court exempted a "ratio calculated [by an agency] from individual components all of which are obtained from" individuals. *OSHA Data/CIH, Inc. v. U.S. Dept of Labor*, 220 F.3d 153, 162 (3rd Cir.2000); *see Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19 (D.D.C.2000) (exempting information that the "Bank obtained ... from the insurance applicants themselves"); *Clarke v. U.S. Dep't of Treasury*, 1986 WL 1234, 1986 U.S. Dist. LEXIS 29989 (E.D.Pa. Jan. 28, 1986) (holding names and addresses of holders of a certain type of bond are obtained from persons). Another held that agency summaries and reformulations of a "person's" raw data are "obtained from a person." *Philadelphia Newspapers, Inc. v. HHS*, 69 F.Supp.2d 63, 67 (D.D.C.1999). Because the borrower's name, the amount it must borrow, and the property it volunteers to provide as collateral is information that originated with the borrower and is reflected in the data Fox seeks, I hold that it was "obtained from" the borrower.

One court found that a borrower's loan information was not "obtained from" the individual borrower, but "generated by" the lending agency, and that, therefore, Exemption 4 did not apply. *Buffalo Evening News v. Small Bus. Admin.*, 666 F.Supp. 467, 469 (W.D.N.Y.1987). The court in *Buffalo Evening News* addressed a request by plaintiff newspaper that the SBA disclose infor-

mation pertaining to SBA loans made in the wakes of a powerful ice storm and a blizzard that damaged a host of small businesses in the region. The SBA responded to an initial request by disclosing a complete list of borrowers' names, cities, and states. Unsatisfied, the plaintiff requested more detailed information, pursuant to FOIA. The SBA made further disclosures, but refused to reveal individual loan amounts or dispositions, claiming that the information was obtained from individuals and covered by Exemption 4.

The court in *Buffalo Evening News* ruled "that 'in no way do these records implicate any financial information provided to the government by the borrower.'" *Id.* at 468 (citing *Miami Herald Publ'g Co. v. Small Bus. Admin.*, 670 F.2d 610 (5th Cir.1982)). The plaintiff asserted:

> [T]he only connection between the information sought here and the information obtained from the borrower is that a loan was granted by the SBA presumably on the basis of the financial records submitted by the borrower and that nothing more or less is established by the release of the requested records, much less the contents of the records submitted by the borrowers.

Id. at 468-69 (quotation omitted). The court held "that all of the information sought by plaintiff here has been generated by the defendant SBA in the course of its involvement with its borrowers." *Id.* at 469. The court reiterated, "this information in no way implicates any of the financial information provided by the borrowers to the government." *Id.*

The facts at issue here are markedly different from those in *Buffalo Evening News*. In *Buffalo Evening News*, the identities of the SBA borrowers were already public, whereas the identities of the Discount Window borrowers are not. The SBA loans in *Buffalo Evening News* were generally available to promote recovery in areas ravaged by storms or other dramatic adverse conditions; the Discount Window loans were focused on particular companies in financial distress. There was no quality of opprobrium in *Buffalo Evening News;* that is in the case before me.

The discount window loans "implicate" potentially "personal" and sensitive financial information, unlike the loans in *Buffalo Evening News*. The Board has legitimate concern that disclosure of information about Discount Window loans can damage them and do incalculable harm to the national economy. As the Board's economist attests,

> Some of these reasons, such as an unexpectedly large loan request from a customer or a runoff in liabilities as a major depositor makes payments to third parties, may result from routine developments and may not indicate an underlying capital or liquidity problem. However, the fact that an institution borrowed from the [Discount Window] may suggest to customers, creditors, analysts, or the news media that its liquidity shortage stems from a financial problem at the institution that is not known by the public at large.

McLaughlin Decl. ¶ 23. The SBA borrowers, on the other hand, clearly needed the loans because of damage sustained in the storms. The SBA loans carried no further implications. Indeed, the court in *Buffalo Evening News* made sure to clarify that its holding was based in part on the fact that "this information in no way implicates any of the financial information provided by the borrowers to the government." *Buffalo Evening News*, 666 F.Supp. at 469.

Because disclosure by the Board implicates the borrower's financial information, and the parties agree that the individual borrowing institutions are "persons," as defined by FOIA, it is not relevant whether FRBs ought to be classified as "persons" or "agencies." 5 U.S.C. § 551(2). Any responsive document qualifies as exempt because it contains information obtained from the borrower: names, amounts, and collateral.

2. Privileged or Confidential

The other element of Exemption 4 is whether the info sought is privileged or confidential. Information is "privileged or confidential" if it is not ordinarily released to the public and "its disclosure would have the effect either (1) of impairing the government's ability to obtain . . . necessary information in the future, or (2) of causing substantial harm to the competitive position of the person from whom the information was obtained." *Continental Stock Transfer v. S.E.C.*, 566 F.2d 373, 375 (2d Cir.1977). The agency has the burden of showing that the information is privileged or confidential and "must identify specific dangers that disclosure will pose." *Nadler v. FDIC*,

899 F.Supp. 158, 162 (S.D.N.Y.1995). "Actual competition and the likelihood of substantial competitive injury is all that need be shown," *Gulf & W. Indus., Inc. v. U.S.*, 615 F.2d 527, 530 (D.C.Cir.1980), by proffering "evidence demonstrating the existence of potential economic harm," *Inner City Press*, 380 F.Supp.2d at 219. In addition, many courts have recognized a third ground on which information may be found privileged or confidential: if disclosure would undermine the agency's "effective execution of its statutory responsibilities." *9 to 5 Org. for Women Office Workers v. Bd. of Governors*, 721 F.2d 1, 10 (1st Cir.1983); *Critical Mass Energy v. NRC*, 975 F.2d 871, 880 (D.C.Cir.1992) (en banc).

The Board has shown specific and substantial harms to borrowers if the information about Discount Window loans were disclosed. The Federal Reserve Bank of Boston's website reads, in part: "There will not be any public disclosure of the individual borrowers participating in [the Discount Window] or the amounts of individual advances made to the borrowers."[11] The institutions borrowing at the Discount Window, the Term Auction Facility, and the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility compete for retail and commercial banking services in the marketplace. "A primary dealer would suffer competitive and reputational harm if its name and the relevant collateral it posted were disclosed to the public," for the public is likely to draw inferences of its relative financial strength

[11] http://www.frb discountwindow.org/mmmf.cfm.

and viability. Logan Decl. ¶ 34. "Anonymity is crucial to primary dealers." *Id.* ¶ 35.

The Board's concerns, that rumors are likely to begin and runs on banks are likely to develop, cannot be dismissed. Similarly, the Board's concern is real that disclosure would reveal proprietary trading information of borrowers, their trading strategies and the size and nature of their portfolios of assets. The national economy is not so out of danger, and the frailty of banks so different now then when their Discount Window borrowing began, as to make the Board's concern academic.

I rule, for all these reasons, that The Board's argument of exemption based on confidentiality is meritorious.

3. Governmental Effectiveness

Courts have recognized a third ground on which information may be found privileged and confidential: that disclosure would undermine the agency's "effective execution of its statutory responsibilities." *9 to 5 Org. for Women Office Workers v. Bd. of Governors,* 721 F.2d 1, 10 (1st Cir.1983); *Critical Mass Energy v. NRC,* 975 F.2d 871, 880 (D.C.Cir.1992) (en banc). Exemption 4 "also protects a governmental interest in administrative efficiency and effectiveness." *Critical Mass Energy,* 975 F.2d at 879; *see Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 n. 17 (D.C.Cir.1974) (indicating Exemption 4 may protect governmental interests). The Second Circuit has not affirmatively accepted this approach, nor explicitly rejected it. *Nadler v. FDIC,* 92 F.3d 93, 96 (2d Cir.1996) ("[W]e do not reach the issue whether the district court properly afforded relief

to the FDIC on the basis of the "program effectiveness" exemption derived from footnote seventeen of *National Parks*."). Nevertheless, judges in this and other district have adopted the analysis. *Africa Fund v. Mosbacher*, 1993 WL 183736 at *7, 1993 U.S. Dist. LEXIS 7044 at *21 (S.D.N.Y. May 26, 1993) (holding confidential export information exempt from disclosure by the Department of Commerce because the information is "invaluable in making policy and maintaining effective export controls"); *Clarke v. U.S. Dep't of Treasury*, 1986 WL 1234 at *1, 1986 U.S. Dist. LEXIS 29989 at *2 (E.D.Pa. Jan. 28, 1986).

In *Clarke*, plaintiff sought the names of all owners of a particular type of United States Treasury bond, as well as the bonds' value and maturity dates. The agency declined to release the documents for fear "investors would be less likely to purchase government bonds in the future if they knew the details of their purchases would be subject to public disclosure." *Id.* at *2, 1986 U.S. Dist. LEXIS 29989 at *5 (citing defendant's unopposed affidavit). The court found that Exemption 4 applied because disclosure would "violate the purchasers' expectations of confidentiality and harm the Treasury Department's ability to issue bonds in the future." *Id.* at *1, 1986 U.S. Dist. LEXIS 29989 at *2. The court relied on uncontradicted affidavit evidence that "[a]ny market participant with access to data concerning the positions of other participants would have a significant competitive advantage." *Id.* at *3, 1986 U.S. Dist. LEXIS 29989 at *7. Similarly, those institutions that borrow at the Discount Window, as well as the other facilities mentioned in Fox's FOIA

requests, do so with the understanding that the loan is confidential. As in *Clarke*, the Board asserts that borrowers would be less likely to use their facilities, if the transactions were not confidential. *Id.*

In another similar case, *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank*, 464 F.Supp. 804 (D.D.C.1979), the agency, "a banking corporation that seeks to facilitate and finance exports and imports between the United States and other countries," offers "loans, guarantees, and other forms of financial assistance." *Id.* at 805. The agency withheld a loan agreement in which it was a party, "maintain[ing] that disclosure would significantly impair its ability to promote United States exports." *Id.* at 808. The agency argued that it might lose applicants to foreign financial institutions that do not disclose, and "that disclosure would . . . impair its effectiveness by making it more difficult to negotiate loan agreements." *Id.* It was concerned as well that disclosure "would discourage commercial bank participation with Eximbank on joint loan agreements, thus impairing Eximbank's ability to control overall financing of transactions." *Id.* The court explained, "borrowers would be less inclined to make concessions that could be disclosed to a future lender." *Id.*

Disclosing details of the facilities Fox identifies would compromise the Board's effective execution of its statutory responsibilities. The Board is charged with: (1) promoting goals of maximum employment, stable prices, and moderate long-term interest rates, 12 U.S.C. § 225a; (2) utilizing its authority to permit lending by FRBs so as to address unusual and exigent circumstances in the

domestic economy, 12 U.S.C. § 343; and (3) employing certain lending practices by FRBs as a safety valve in relieving liquidity strains for individual depository institutions and the banking system, and to complement open market operations in achieving the target federal funds rate, 12 U.S.C. § 347b(b). In essence, borrowers would view taking such last-resort, publicly disclosed loans as unwise because it would stigmatize the company and lead to a, perhaps false, belief that the company is in financial trouble. This would undermine the Board's mandate to provide stability to markets, especially during a financial crisis. Under this rationale, withholding information regarding even loans paid months ago is mandated by Exemption 4.

Conclusion

For the reasons stated above, I hold that Exemption 4 exempts disclosure of the responsive documents that the Board located in its search. Accordingly, I grant the Board's motion for summary judgment and deny Fox's motion, except that the Board must conduct an additional search of the unopened attachment and make appropriate disclosures.

The Clerk shall mark motions Nos. 8 & 13 as terminated and close the case, subject to reopening within sixty days for matters relating to the remaining search.

SO ORDERED.

5 U.S.C. § 552(b)

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute

a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency respon-

sible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

Supreme Court U.S.
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No. 10-660

IN THE
Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, LLC,
Petitioner,

v.

FOX NEWS NETWORK, LLC, AND THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT FOX NEWS NETWORK, LLC

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly concluded that daily reports of borrowing from the Discount Window and other emergency lending programs established by the Board of Governors of the Federal Reserve System are government records, not information "obtained from a person" within the meaning of Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4).

2. Whether the Second Circuit correctly held that a federal agency's speculation regarding future harm to the effectiveness of its programs does not authorize the agency to withhold records under Exemption 4 of FOIA.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Fox News Network, LLC, owner of the Fox Business Network ("Fox Business"), states that News Corporation, a publicly held company which is publicly traded, is Respondent's ultimate parent. No other publicly held corporations own 10% or more of Respondent's stock.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for a writ of certiorari, and relies instead upon pure conjecture regarding the future impact of FOIA disclosure upon the operation of federal lending programs. Petitioner's warnings should not be taken at face value, not least because the Solicitor General has not asked this Court to review the decision and has, in fact, filed as a respondent opposing certiorari review. In any event, this case is not a compelling candidate for Supreme Court review. Applying settled law, the Second Circuit properly determined that reports generated by the Board of Governors of the Federal Reserve System (the "Board") of lending at the Discount Window and other special credit and liquidity programs are government records, not documents "obtained from a person," and that the reports are not "confidential" within the meaning of FOIA Exemption 4. The Second Circuit's determination does not warrant review for four reasons.

First, the issues in this case have been superseded by intervening legislation. Pursuant to comprehensive financial reform legislation enacted this past summer, Congress directed the Board to disclose many of the records that Fox Business had requested in this case by December 1, 2010, which it did. Moreover, under the terms of the new legislation, Congress set out a new legal regime for the release of future Discount Window records, providing them with an express two-year exemption under FOIA, and then mandating their release after that time. Congress has now conclusively addressed

the disclosure requirements the Petition raises and made its policy preferences clear. Any intervention now by this Court is unneeded in light of these legislative developments.

Second, there is no split of authority that warrants review by this Court. No Court of Appeals has ever adopted Petitioner's view that the "obtained from a person" language of Exemption 4 applies to information that, as the Second Circuit put it, is created by "the agency's own executive action." Likewise, there is no meaningful split regarding the so-called "program effectiveness" expansion of Exemption 4. Other than two decades-old opinions from the First and the D.C. Circuits, there has *never* been a case from the courts of appeals (including those circuits) that has recognized, much less applied, the "program effectiveness" test. Against this background, the Second Circuit's decision not to revive those long-quiet cases creates no split worthy of this Court's review.

Third, the absence of the United States as a party seeking review creates a substantial standing problem. Petitioner is a banking association owned by a handful of large commercial banks, not a federal agency.[1] Even if the Petition presented a more urgent question than it does concerning the effectiveness of Federal Reserve lending programs, only a federal agency is entitled to represent federal

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[1] According to Petitioner, its members are: ABN Amro Bank, N.V.; Bank of America, N.A.; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

interests as a department of the United States government. Just as the Board is exclusively empowered under the Federal Reserve Act to authorize and oversee emergency lending programs, only the Board can sue to protect its powers under those programs. Petitioner, as an association of eight commercial banks, cannot stand in the shoes of the nation's central bank.

Fourth, the decision below was correct. Significantly, the Court of Appeals heard and decided the appeal in this action in tandem with another appeal, *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010) ("*Bloomberg*"), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct. 26, 2010) (No. 10-543). The Fox Business FOIA Requests are substantially similar to the requests at issue in the *Bloomberg* appeal and seek the same categories of documents from the Board.[2] In both *Fox News* and *Bloomberg*, the Court of Appeals reached the unremarkable conclusion that information generated by the Board was not the type of information that Exemption 4, with its safeguards for information provided by businesses, was intended to protect. Likewise, the Second Circuit's determination that the information could not be withheld on amorphous "program effectiveness" grounds was also correct and consistent with this Court's decision in *FOMC v. Merrill*, 443 U.S. 340

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[2] The Fox Business FOIA Requests seek records covering a longer period of time than the Bloomberg requests. In addition, Fox Business seeks the Board's records of pledged collateral, which are located at the regional Federal Reserve Banks ("FRBs").

(1979), in which this Court squarely refused to adopt a similar "public interest" exemption within the context of FOIA Exemption 5.

At bottom, Petitioner asks this Court to review the judgment based on an assertion that the Second Circuit's decision will have harmful economic effects. Pet. at 7-9. But that assertion does not bear scrutiny. Much of the information requested by the Fox Business FOIA Requests has now already been released and publicized without any ill effects. The legal regime that Petitioner claims is vital has never been the law at any time, again without obvious ill effects. And when given the chance to address the issue, Congress acted to *mandate* disclosure in its new legislation. All of these factors taken together, and coupled with the United States' opposition to this Court's review, demonstrate that the Petition should be denied.

STATEMENT

A. The FOIA Requests and the Board's Response.

Fox Business submitted its FOIA Requests in late 2008 after the Board had authorized an unprecedented expansion of the Federal Reserve System's emergency lending programs. Before the financial meltdown of 2008, the primary method traditionally used by the Federal Reserve System to regulate the banking and financial system was to lend money overnight to member financial institutions, primarily through the "Discount Windows" operated by the regional Federal Reserve

Banks ("FRBs"). (J.A. 257).[3] Under the Discount Window system, the FRBs lend money on a short-term basis to eligible depository institutions, *i.e.*, commercial banks, savings and loan associations, savings banks and credit unions. (J.A. 257). All loans obtained through the Discount Windows are secured by collateral. (J.A. 257). Discount Window lending is conducted pursuant to the Board's statutory authority under Section 10B of the Federal Reserve Act ("FRA"), 12 U.S.C. § 347b.

On August 17, 2007, the Board approved temporary changes to the primary credit program of the Discount Window to allow the FRBs to make loans to depository institutions for as long as 30 days. (J.A. 257-58). In December 2007, the Board announced the establishment of the Term Auction Facility ("TAF"), which further expanded primary credit through an auction mechanism. In addition to expanding access to the Discount Window, the Board also created several new lending facilities for borrowers other than depository institutions pursuant to its rarely invoked authority under section 13(3) of the FRA,[4] including the Primary Dealer Credit Facility ("PDCF") and the Term Securities Lending Facility ("TSLF"). (J.A. 258).

The expansion of Federal Reserve lending programs led to a dramatic increase in the amount of loaned public funds. The average outstanding

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[3] All citations to "J.A. __" are to the Joint Appendix filed in the Second Circuit in the *Fox News* appeal.

[4] Under 12 U.S.C. § 343, the Board may authorize the FRBs to extend credit to any "individual, partnership, or corporation" in "unusual and exigent" circumstances.

amounts loaned under all of the Board's lending programs ballooned from approximately $1 million during the week of August 8, 2007 to more than $188 billion during the week ending December 31, 2008. (J.A. 259). As of December 29, 2010, the balance of primary and other lending from facilities covered by the Fox Business FOIA Requests stood at approximately $26 billion.

On November 10, 2008, Fox Business submitted the first of two FOIA requests, seeking:

> the names of institutions receiving Federal Reserve lending from programs including but not limited to the following: Regular OMOs; Single-Tranche OMO Program; Discount Window; Term Discount Window Program; Term Auction Facility; Primary Dealer Credit Facility; Transitional Credit Extensions; ABCP Money Market Liquidity Facility; Securities Lending; Term Securities Lending Facility; Term Securities Lending Facility Options Program; and any other Federal Reserve lending facility not mentioned above. (J.A.169-70).

The November 10 FOIA Request also sought "an accounting of the collateral provided by these institutions in exchange for the lending." (J.A. 170).

On November 18, 2008, Fox Business submitted a second FOIA request, which sought records of Federal Reserve lending under the same programs during the months of September 2008 and October 2008. This second FOIA request asked the Board to provide not only the name of the borrowing

institutions, but also documents reflecting the amounts borrowed and the collateral pledged by each such institution. (J.A. 64-66). Finally, Fox Business requested information about "the collateral held by the Fed at the close of business on November 14, 2008 [including] information sufficient to match the institutions with the collateral they pledged." (J.A. 64-66).

In a letter dated January 6, 2009, the Board acknowledged that it had documents directly responsive to the November 18 FOIA Request but, citing Exemption 4 and the exemption for inter-agency and intra-agency memoranda separately contained in Exemption 5, refused to disclose those records. (J.A. 72-77).[5] The Board further admitted that records concerning the collateral pledged to the FRBs existed, but took the position that such records were not "records of the Board" subject to the Board's FOIA obligations. (J.A. 81, 270). After Fox Business commenced the instant action in the District Court, the Board provided *Vaughn* indexes for each of the two FOIA Requests,[6] again claiming that it was entitled to withhold all responsive documents in its

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[5] The Board did not respond to Fox Business's prior FOIA Request until January 16, 2009, when it issued a letter denying the request for the same reasons that the November 18 FOIA Request had been denied. (J.A. 57-62). By that time, Fox Business had already filed the complaint in this action.

[6] In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the District of Columbia Circuit adopted a procedure widely followed in FOIA cases, whereby federal agencies submit an index similar to a privilege log, describing the documents for which agencies claim a FOIA exemption.

possession pursuant to both Exemption 4 and Exemption 5.[7]

The *Vaughn* indexes principally identified and described three categories of Board records that contain transaction-level information responsive to the Fox Business FOIA Requests. Specifically, the Board revealed that it possessed and was withholding "Origination Reports" for each business day in the period covered by the Fox Business FOIA Requests. Origination Reports list the prior business day's Discount Window loans by the name of the borrowing institution and contain, among other things, the maturity date, the FRB district, and the amount of each loan. (J.A. 29-30). The Board also withheld "Remaining Term Reports," which similarly contained records of Discount Window lending, organized by the name of the borrowing institution, and contained the origination and maturity dates, the total amount of credit outstanding and the total amount maturing on a specific date. (J.A. 30-31). The *Vaughn* indexes similarly described "Emergency Credit Reports," which reflected borrowing from the newly created special credit facilities for non-depository institutions such as the PDCF and the TSLF.[8]

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[7] The Board abandoned its claim to Exemption 5 in the appeal before the Second Circuit. Accordingly, only Exemption 4 is relevant to the instant Petition.

[8] The *Vaughn* indexes also identified e-mails and a draft of procedures for monitoring collateral.

B. Exemption 4 and the National Parks Test.

FOIA establishes a strong presumption in favor of disclosure of government records. *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Under the statute, federal agencies must disclose records unless one of nine enumerated exemptions applies. 5 U.S.C. §§ 552(b)(1) through (b)(9).

The only FOIA exemption at issue in this matter is Exemption 4, which permits the government to withhold, in whole or in part, records constituting (i) "trade secrets and commercial or financial information" (ii) "obtained from a person" and (iii) "privileged or confidential." All three criteria must be satisfied if an agency is to assert Exemption 4. It was undisputed below that the first condition of Exemption 4 was present, *i.e.*, that the records at issue were "commercial or financial information."

With regard to the second part of Exemption 4, whether government records are "obtained from a person" is determined by the definition of "person" supplied in section 551(2), which includes "an individual, partnership, corporation, association or public or private organization *other than an agency*." (Emphasis supplied).

With regard to the third part of Exemption 4, the statute does not supply a definition of the term "confidential". The federal courts have generally followed a two-part test that was first established in *National Parks & Conservation Ass'n v. Morton ("National Parks")*, 498 F.2d 765 (D.C. Cir. 1974), which treats agency records as "confidential" for purposes of Exemption 4 *if* their disclosure would

either: (1) impair the government's ability to obtain necessary information from third parties, or (2) cause substantial harm to the competitive position of the business submitter from which the information was obtained.

In arriving at this two-part test for "confidential" information, the *National Parks* court examined the evidence of Congress's purpose in adopting Exemption 4. The *National Parks* court methodically reviewed the congressional record and reasoned that the core purpose of Exemption 4 was to prevent competitors from using a FOIA request to obtain and then unfairly exploit commercial information that particular business submitters provided to a federal agency. 498 F.2d at 767-70. *National Parks* reasoned that the prospect of a competitor's unrestricted right of access to such information implicated two conjoined interests in confidentiality that Congress intended to protect through Exemption 4, a governmental interest and a private interest. The *National Parks* court therefore explained that its judicial formulation of "confidentiality" within Exemption 4 had a "twofold justification . . . (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769.

The First Circuit and the District of Columbia Circuit have gone a step further and endorsed a third, alternative definition of "confidential," extending it to cover any information the release of which might adversely impact the "effectiveness" of a federal agency's programs. *9 to 5 Org. for Women*

Office Workers v. Bd. of Governors ("9 to 5"), 721 F.2d 1 (1st Cir. 1983); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n ("Critical Mass I")*, 830 F.2d 278, 287 (D.C. Cir. 1987), *overruled by Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). These circuits relied upon dicta appearing in a footnote in *National Parks*, in which the District of Columbia Circuit recited that "we express no opinion as to whether other *governmental interests* are embodied in this exemption." 498 F.2d at 770, n. 17. (Emphasis supplied).

C. **Proceedings Below.**

It was undisputed in the District Court that the Origination Reports, Remaining Term Reports and Emergency Credit Reports are agency records, generated by the Board itself from the FRBs' daily reporting of Federal Reserve lending to depository and non-depository institutions. Thus, these reports were agency records, presumptively disclosable under FOIA.

The Board sought to overcome the presumption of disclosure by invoking Exemption 4. At the outset, the parties were agreed that the requested information was "commercial or financial" under the first part of the tripartite test in Exemption 4. Only the latter two prongs of Exemption 4 were at issue, *i.e.*, whether the information contained in the reports was "obtained from a person," and whether it constituted "privileged or confidential" information within the meaning of FOIA.

In addressing whether the information was "obtained from a person," the Board identified two possible candidates for the role of "person": (i) the borrowing banks and (ii) the FRBs. Although the reports did not contain particular business information passed on to the FRBs by any borrower (such as the loan application, financial statements or other proprietary information), the District Court (Hellerstein, *J.*) believed that the name of the borrower itself and the mere fact of the loan constituted "information that originated with the borrower." Accordingly, in an opinion dated July 30, 2009, the District Court found that the information listed in the Board's reports was "obtained from a person," *i.e.*, the borrowers, even though the information was actually tabulated by the FRBs as the record of their own executive action in making the loans and then incorporated in the Board's reports. Pet. App. 42-46. Judge Hellerstein did not reach the question of whether the FRBs were "persons" as opposed to agencies for purposes of Exemption 4.

The District Court went on to find that the "confidentiality" prong under Exemption 4 applied because any disclosure, even the mere fact of Discount Window and other FRB lending, would cause harm to the borrower's competitive position by causing a "stigma," potentially leading to a "run on the bank" by nervous depositors. Pet. App. 48. The District Court revealed in particular that its grant of summary judgment to the Board was based on the District Court's concern that "[t]he national economy is not so out of danger, and the frailty of banks so

different now than when their Discount Window borrowing began, as to make the Board's concern academic." *Id.*

The District Court separately held that the Origination Reports and Remaining Term Reports were "confidential" for an additional, independent reason, *i.e.*, not because their release might implicate the borrower's commercial information, but because disclosure might impair a "confidentiality" interest of the Board in the continued effectiveness of its lending programs. Pet. App. 48-51.[9] Thus, neither the confidentiality interest of the "person" from whom the Board asserted the information originated (the borrower) nor the confidentiality interest of the second layer of "persons" (the FRB) through which the information passed was at issue; instead, the interest of the Board (the agency that obtained the information) became the relevant consideration.

However, one month later, on a nearly identical record, the Chief Judge of the same District Court (Preska, *C.J.*) rendered a diametrically opposite decision. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009). Judge Preska found that Exemption 4 was inapplicable, either under its "obtained from a person" prong or the "confidentiality" prong. First, Judge Preska held that "[t]he only information in the Remaining Term Reports that the FRBNY and other

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[9] In a ruling not directly relevant to this Petition, the District Court held that records of collateral pledged to the FRBs were not records of the Board pursuant to 12 C.F.R. §§ 261.2(d)(1)(i), 261.2(d)(1)(ii) and 261.3(a), and therefore not subject to FOIA. Pet. App. 32-37.

FRBs could possibly have obtained from the borrowers is the borrowers' name; the FRBs generated all the other information from internal data regarding their lending programs." *Id.* at 277. Under the "confidentiality" prong, Judge Preska noted that the Board had not identified any risk of imminent competitive harm to borrowing banks *from competitors* and rejected as purely conjectural the Board's assertion that release of the information might result in a "run" on the bank. *Id.* at 279-80. In addition, Judge Preska expressly declined to follow Judge Hellerstein's adoption of the "program effectiveness" test. *See id.* at 278-79, n. 15.[10]

After a nearly two-hour long consolidated oral argument on January 11, 2010, the Second Circuit reversed Judge Hellerstein's judgment in the *Fox News* case and affirmed Chief Judge Preska's judgment in the *Bloomberg* case. By twin decisions entered on March 19, 2010, the Second Circuit held that the identity of a bank that borrowed from the Federal Reserve, the dollar amount of the loan, the origination and maturity dates and the collateral securing the loan were records of executive action, not information "obtained from a person" (*i.e.*, the borrowing banks) under the second prong of Exemption 4. *Bloomberg,* 601 F.3d at 147; *Fox News*, Pet. App. 10. Therefore, the Second Circuit did not reach the question of whether such

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[10] The Board did not attempt to argue that disclosure of the reports would impair the Board's ability to obtain necessary information from depository institutions in the future in either the *Fox News* case or the *Bloomberg* case. Thus, the first part of the *National Parks* test for confidentiality is not at issue.

information was "confidential" from the point of view of the borrower.

Having decided that the borrowers were not "persons" from whom the requested information was obtained, the Second Circuit proceeded to consider the Board's alternative argument that the FRBs qualified as "persons" for purposes of Exemption 4's tripartite test. The Second Circuit declined to resolve that question because, even if the information in the Remaining Term Reports were obtained by the Board "from a person" (the FRBs), Exemption 4 was still inapplicable because those reports were not "confidential" from the FRBs' point of view. Competitive harm to the borrowers was irrelevant for this purpose if the "persons" from whom the information was obtained were the FRBs. Since the record did not show that the FRBs are subject to competition in the marketplace, or that the disclosure of the requested information would otherwise cause competitive injury to the FRBs, the Second Circuit concluded that the records could not be confidential under the *National Parks* test. *Bloomberg*, 601 F.3d at 150.

Since the Board had not demonstrated that its records could be confidential under the traditional *National Parks* test, the Second Circuit considered whether the *National Parks* test of an agency record's confidentiality should be judicially expanded to include information which—if disclosed—could impair the "program effectiveness" of the Discount Window or other Federal Reserve lending facilities. The Second Circuit held that adoption of the "program effectiveness" test would give

impermissible deference to federal agencies, allowing them to avoid disclosure under FOIA based upon their own say-so. The Second Circuit noted that this Court had already rejected an equivalent "public interest" exemption over thirty years ago in *FOMC*.

In the *Fox News* appeal, the Court of Appeals confronted a question not presented in the *Bloomberg* appeal, namely, whether records reflecting the pledge of collateral to the FRBs constituted records of the Board subject to FOIA. The panel reversed Judge Hellerstein's judgment and remanded with instructions to determine whether any of the FRB records relating to collateral were maintained "for administrative reasons" and, hence, records of the Board pursuant to 12 C.F.R. § 261.2(i)(1)(ii), and to determine the scope of Fox Business's requests for collateral information. Pet. App. 14-16.

The Second Circuit denied the Board's motion for rehearing and rehearing *en banc* by an order entered on August 20, 2010. Pet. App. 5-6.

D. The Dodd-Frank Act.

On July 21, 2010, the President signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Dodd-Frank contains provisions that make substantial changes to the Board's disclosure obligations. Specifically, §1109(c) of the Act required the Board to disclose on its website transaction-level data regarding FRB loans under the PDCF, TSLF and TAF. The Board complied with the disclosure requirement on

December 1, 2010, publishing the identity of borrowers, loan amounts, interest rates and the dollar value of pledged collateral. Accordingly, many of the records at issue in this case became public. Within scant minutes of the Board's disclosure of those records, Respondent Fox Business Network and other media companies broadcasted the information on live television, in print and over the Internet. Publication of these documents on the Board's website did not result in a "run on the bank"; the Dow Jones Industrial Average closed up at the end of the day's trading and has trended upward since that time (as have the shares of Petitioner's member banks); and the disclosures otherwise quickly became "yesterday's news."

Dodd-Frank also contains provisions that change the Board's disclosure requirements going forward. Section 1103(b) of the Act directs the Board to publish data regarding all future Discount Window borrowing within two years of the origination of the loan. In return, Dodd-Frank creates an explicit statutory FOIA exemption pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3") to cover the two-year interval between loan origination and mandatory Board disclosure. *See* Dodd-Frank Act at § 1103(b) (amending 12 U.S.C. § 248). Thus, the application of Exemption 4 to records of Federal Reserve lending activities is an almost entirely academic question.

E. Intervention.

Petitioner was not a party to the *Fox News* appeal in the Second Circuit. However, after the Solicitor General elected not to seek further review, on

October 26, 2010, Petitioner moved to intervene and stay the issuance of the mandate in this action pending the outcome of this Court's disposition of the petition in the *Bloomberg* case or, in the alternative, to allow Petitioner to file the Petition in the instant case. The Second Circuit granted the motion by order dated November 16, 2010. Pet. App. 1-2.

REASONS FOR DENYING THE WRIT

I. The Case is a Poor Vehicle for Considering the Questions Presented Because the Issues Are Already Largely Moot In Light of Superseding Legislation.

Petitioner concedes that a significant part of this case will have become moot by the time the Court disposes of the Petition. Pet. at 7-8 & n.4. Indeed, it already has. As explained above, pursuant to §1109(c) of Dodd-Frank, many of the documents at issue in this case were disclosed on the Board's website on December 1, 2010. That disclosure by itself is sufficient to make review by this Court in this case unwarranted, but Dodd-Frank goes even further by changing the very legal framework that Petitioner is asking this Court to address. As noted, Dodd-Frank creates a new FOIA exemption that allows the Board to withhold Discount Window records created after the Act's enactment for two years after origination, but then mandates their disclosure after that time. Congress's normative, legislative judgment regarding the need to protect borrowing banks from FOIA disclosure is therefore unmistakably clear: the Board and the depository institutions that borrow from the Discount Window

do not require protection from FOIA disclosure for any longer than two years after the origination of a loan. There is no need for this Court to determine what FOIA requires in this context when Congress has now definitively spoken on the subject.

To be sure, Dodd-Frank does not address Discount Window records created before the passage of Dodd-Frank, but this Court should not grant review to address the disclosure obligations for that small category of records, a category the importance of which is diminishing with each passing day. First, Congress could have chosen to expand the FOIA exemption in Dodd-Frank to such records, but it did not do so, making such records presumptively disclosable under FOIA.[11] Second, to the extent that any of the borrowers that were identified on the Board's website on December 1, 2010 are also listed in the Remaining Term Reports, the fact that those

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[11] Significantly, from the inception of FOIA, Congress has always known how to exempt data regarding financial institutions from disclosure where, *in its view*, secrecy would serve the public interest. Notably, Congress expressed its concern that private financial data, "if indiscriminately disclosed, [could] cause great harm" by enacting 5 U.S.C. § 552(b)(8), which exempts from disclosure information obtained in "examination, operating, or condition reports" prepared in the course of an agency's supervision of a financial institution. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Thus, Congress has now had at least two occasions on which to consider the degree of protection that Federal Reserve records require from FOIA. The absence of an express provision for pre-2010 Discount Window records – either in FOIA, the Federal Reserve Act or, now, in Dodd-Frank – suggests that no such exemption from the general rule of disclosure was intended.

borrowers used emergency Federal Reserve lending during the financial crisis is already in the public domain. And in any case, records of past Discount Window borrowing as a class are stale and becoming increasingly more stale. Their staleness is particularly clear in the context of this case given that all such records sought by Respondent date from 2007 and 2008. Their age thus exceeds the two years that Congress determined was the appropriate time for disclosure for future records. Moreover, as a result of the expiration of the non-Discount Window facilities, the abatement of the financial crisis and the prospective disclosure of future Discount Window borrowing, the federal courts are unlikely ever to be presented again with the issue of whether the records of such past borrowing should be withheld under FOIA Exemption 4. Thus, to the extent that the action is not moot as a matter of law, it is moot as a practical matter and is therefore not a compelling case for this Court's review.

II. Review Is Unwarranted Because Petitioner's Claim Of A Circuit Split Is Unfounded.

Petitioner contends that review is warranted because the Second Circuit's decision in *Bloomberg* and *Fox News* departs from those of other courts. That is incorrect. With respect to the first question posed by the Petition – the meaning of the phrase "obtained from a person" under Exemption 4 – no Court of Appeals has ever adopted the interpretation that Petitioner urges. Instead, as the Second Circuit explained, Petitioner's position would for the first time exempt "disclosure of the agency's own executive actions." *Bloomberg*, 601 F.3d at 148-49.

Petitioner contends that the D.C. Circuit has adopted its position (Pet. at 29), but neither of the cases it cites even mentioned the "obtained from a person" requirement, let alone adopted an interpretation opposed to the Second Circuit's. *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37 (D.C. Cir. 2008); *McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin.*, 180 F.3d 303 (D.C. Cir. 1999). Instead, as the Second Circuit expressly recognized, its position follows the D.C. Circuit's determination in *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403–04 (D.C. Cir. 1980), that the exemption is "restrict[ed] ... to data which have not been generated within the Government." *Bloomberg*, 601 F.3d at 148. Petitioner does not even cite *Board of Trade*, and the rest of its discussion is limited to district court cases that, as we explain below, are off-point as well. *See infra*.

As for Petitioner's claim of a split in authority regarding the so-called "program effectiveness" variation of Exemption 4, any split is shallow and stale at most. Although, as the Second Circuit acknowledged, both the First and D.C. Circuits have described such a theory, there is less to this "circuit split" than meets the eye. In the first place, the First Circuit's determination in *9 to 5* is nearly 30 years old, and the D.C. Circuit's determination in *Critical Mass* is nearly 20 years old. In the time since they were decided there has not been a *single* Court of Appeals case – from any circuit – applying the

program effectiveness exception.[12] Given the total dearth of such cases, even from the two circuits that purportedly recognize the exemption, the split does not constitute a pressing issue in the lower federal courts.

Moreover, it is not even clear that there has ever been a case that turned on the program effectiveness exception. In *9 to 5*, the First Circuit's discussion of the "program effectiveness" test was dicta because the holding was based upon the first prong of the traditional *National Parks* test. As it turned out, the First Circuit affirmed the Boston FRB's decision to withhold records on the ground that persons with "necessary information . . . may decline to cooperate with officials and *the ability of the Government to make intelligent, well informed decisions will be impaired.*"[13] 721 F.2d at 10 (citing *National Parks*, 498 F.2d at 767). (Emphasis in original).

The "program effectiveness" theory in Exemption 4 received a similarly ambiguous treatment in the *Critical Mass* case in the D.C. Circuit. A panel of the D.C. Circuit held in 1987 that agency records *could*

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[12] District court cases are barely more plentiful. In the nearly 30 years since *9 to 5*, there appear to be fewer than a half dozen cases addressing the exception.

[13] The persuasive authority of the First Circuit's holding in *9 to 5* is also open to question because it applied a deferential standard of review to the FRB's determination to withhold the salary records at issue in that case. *9 to 5*, 721 F.2d at 10. No such deference is permitted under FOIA, which expressly prescribes *de novo* review. 5 U.S.C. § 552(a)(4)(B). *See also DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989). Notably, then-Judge Breyer was on the panel that decided *9 to 5*, but filed a dissenting opinion.

be deemed confidential for purposes of Exemption 4 if, as a result of a FOIA request, the NRC were obliged in the future to obtain the information at issue through subpoenas or regulatory compulsion, rather than by voluntary cooperation. *See Critical Mass I*, 830 F.2d at 286. *Critical Mass I* simply held that if it were proved on remand that resort to those more cumbersome methods impaired the functioning of the NRC, withholding might be permissible. However, following remand by the panel in *Critical Mass I* to the district court and a subsequent appeal before a different panel, the D.C. Circuit overruled *Critical Mass I* in an en banc rehearing. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). In the end, the D.C. Circuit's determination that the records could be withheld under Exemption 4 did not turn upon the "program effectiveness" test at all. Rather, the en banc court based its final judgment upon the determination that the records had been voluntarily supplied to the NRC and that the traditional *National Parks* test only applied where an agency obtained such information by legal compulsion. Significantly, in doing so, the D.C. Circuit appeared to return the "program effectiveness" test to its previously unresolved state.[14] Against this background, the Second

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[14] "Although we overrule our decision in *Critical Mass I*, we note that the panel there adopted the First Circuit's conclusion that the exemption also protects a governmental interest in administrative efficiency and effectiveness. . . And today, of course, we recognize a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis. We offer no opinion as to whether any

Circuit's determination not to adopt "program effectiveness" as a test for the confidentiality of documents under Exemption 4 creates no circuit split that warrants this Court's review.

III. Petitioner Lacks Standing To Assert Harm To The Effectiveness Of Federal Reserve Lending Programs.

Even if the consideration of "program effectiveness" in the context of Exemption 4 represented a live issue among the Circuits, Petitioner does not have standing to raise that issue in this Court. Only a federal agency has a cognizable interest in the impact of FOIA exemptions on the operation of federal programs. *See, e.g., Hercules, Inc. v. Marsh,* 839 F.2d 1027 (4th Cir. 1988) (only the Army, not a reverse-FOIA plaintiff, can assert potential harm to Army's ability to obtain necessary information in the future). *See also Sears, Roebuck & Co. v. Gen. Serv. Admin,* 384 F. Supp. 996, 1004 (D.D.C. 1974) (private litigant has no standing to assert FOIA exemption 552(b)(7) for records relating to ongoing government investigation, which is designed solely to protect agency's interests). Not surprisingly, neither the First Circuit in *9 to 5*, the District of Columbia Circuit in *Critical Mass*, nor the legislative history upon which the *National Parks* court relied give any indication that Congress intended to appoint business submitters as "private attorneys general" for purposes of defending *government* interests under FOIA.

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other governmental or private interest might also fall within the exemption's protection." 975 F.2d at 879.

Moreover, even if the Court were satisfied that the Petitioner or its members had a sufficient interest in the viability of Federal Reserve lending programs to acquire Article III standing, and even if the question presented were of sufficient importance to merit review in this Court, this would still be the wrong case in which to resolve the question. If this Court is to resolve whether records are "confidential" under Exemption 4 because their disclosure might impact the effectiveness of a federal agency's programs, the better vehicle for such a discussion would be a case in which the Solicitor General has elected to seek review on behalf of the affected agency. Here, the United States has elected not to appeal from the Second Circuit's judgment. Nor can it be assumed that Petitioner or its member banks on the one hand and the Board on the other have a complete unity of interests where the "effectiveness" of Federal Reserve lending programs is concerned. Quite the opposite: Petitioner does not regulate the money supply or have responsibility for promoting stability in the national economy. Accordingly, the Clearing House Association is the wrong party to bring the questions presented in the Petition.[15]

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[15] In addition, Fox Business respectfully submits that the Second Circuit improvidently granted Petitioner leave to intervene because Petitioner lacks associational standing to assert any private interest in the confidentiality of the Board's records. Where the proposed intervenor is a membership association, it must be shown that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in

IV. The Decision Below Was Correct On The Merits.

Apart from failing to satisfy the standards for review on a writ of certiorari, the Petition fails because the Second Circuit's decision was plainly correct.

A. The Court of Appeals Correctly Found That the Remaining Term Reports and the Origination Reports Were Not "Obtained From a Person."

The Second Circuit correctly applied Exemption 4 and found that the information contained in the Board's reports constituted records of agency action, not commercial information supplied by a business submitter. The Second Circuit properly recognized that while raw data typically contained in a bank's application for short-term credit (*e.g.*, profit and loss information, reserves, accounts receivable or other

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the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). To meet that burden, an association must identify one or more members allegedly affected by the litigation and factual circumstances that would enable the court to evaluate the potential harm. *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 50-52 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). But Petitioner never identified a single member who borrowed from the Federal Reserve, much less one that has a concrete commercial interest that could be impaired by implementation of the judgment. And even if Petitioner had "named names," which it declined to do below, its standing would *still* be in question because it failed to plead that any one of its identified members will suffer an "injury in fact," which is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

financial information relevant to a FRB's assessment of a borrowing bank's risk) would be the classic variety of information "obtained from a person" that Exemption 4 sought to protect, the information contained in the Remaining Term Reports were nothing of the kind. Rather, the information sought by the Fox Business FOIA Requests constituted nothing more than records of lending by the FRBs under the authority of the Board.

Petitioner attempts here, as the Board did below, to characterize the identity of a borrowing bank—its name, and nothing more than that—as an item of information obtained by the agency "from a person." Thus, for example, Petitioner urges that "[b]oth appeals concern Board reports reflecting highly confidential information *about the identities of banks* that borrowed through certain Board lending programs . . ." Pet. at 4. (Emphasis supplied). The Second Circuit easily saw through this wordsmithing. That loans were given to particular banks in particular amounts are objective facts that came into existence only after the transactions were consummated. Thus, in a directly analogous case involving loans by the Small Business Administration, the district court in *Buffalo Evening News v. Small Bus. Admin.*, 666 F. Supp. 467, 469 (S.D.N.Y. 1987), held that Exemption 4 did not authorize withholding records identifying "individual loan amounts, . . . outstanding balances and payment, collection, or discharge status," as that information had been generated by the government and "in no way implicate[d] any of the financial information provided by the borrowers to the

government." The Second Circuit properly followed this reasoning in *Bloomberg*. "True, disclosure of loan terms allows one to back into information about the borrower; inferences may be drawn that the bank that got the loan asked for it . . . The fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Bloomberg*, 601 F.3d at 148. (Emphasis in original; citations omitted).

The Second Circuit's delineation between commercial information supplied by a business on the one hand and the record of an agency's dealing with that business on the other finds ample support in decisions of this Court and other federal courts. Indeed, this Court explained in *FOMC* that information generated by the government itself is not information "obtained from a person." *FOMC*, 443 U.S. at 360. *See also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) ("materials implicating Exemption 4 are generally not developed within the agency"). It follows that when the Board creates an internal record of lending by the Federal Reserve System, it has generated precisely the sort of information that FOIA was intended to make available to an educated public – information regarding what the government is up to.

Petitioner attempts to justify certiorari review on the ground that the Second Circuit's analysis of whether the Board's records of FRB lending were "obtained from a person" would disrupt other federal programs that purportedly depend upon maintaining

the confidentiality of commercial transactions with federal agencies. *See* Part I.A of the Petition, at 25-30. Petitioner's domino theory fails, however, for a number of reasons.

The most immediate and obvious problem with Petitioner's argument is that it conflates the "confidentiality" prong of Exemption 4 with the separate, antecedent question of whether the information contained in a government record was "obtained from a person" in the first instance and not by the agency. While Petitioner nominally discusses in Part I.A whether the information recorded in the Remaining Term Reports was "obtained from a person," on closer examination Petitioner has actually changed the subject, leading the Court into a discussion of Exemption 4's confidentiality prong and the merits of the "program effectiveness" theory. Pet. at 30-31. Unfortunately for Petitioner, the plain language of the statute does not allow that kind of a detour. By its language, Exemption 4 has three constituent parts, exempting from disclosure only those records that constitute: "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." On its face, Exemption 4 applies only if *all three* criteria are satisfied and the federal courts have repeatedly so held. *See, e.g., Inner City Press/Community on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006); *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996); *Getman v. N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971). Taken to its logical conclusion, the Petition would extend Exemption 4 automatically to any record of a

transaction between the government and a private business entity so long as the business could articulate an interest in keeping its dealings confidential. In other words, Petitioner would have the Court either skip the statutory requirement that the subject information have been "obtained from a person" or treat it as automatically satisfied if the element of confidentiality is present. Petitioner's "two for the price of one" argument therefore violates the canon of statutory construction that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Petitioner musters a series of lower court decisions in which it states that "courts have held or assumed that a third party's commercial dealings with the government consist of information 'obtained from a person.' " Pet. at 26. Those decisions, however, are either readily distinguishable from the instant case or, as Petitioner unwittingly concedes, "assumed" that the relevant information was "obtained from a person" without much analysis. For example, *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000), cited by Petitioner, involved records that constituted "summaries or reformulations" of information supplied to the Export-Import Bank, *i.e.*, the insurance applicants' financial information and/or export plans contained in their applications for export insurance. *Id.* at 28-29. *Judicial Watch* is distinguishable on its face from the instant case. As the Second Circuit observed, "Bloomberg's [and Fox News's] FOIA request does not seek loan

applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Bloomberg*, 601 F.3d at 148. [16]

Similarly, Petitioner relies upon *Clarke v. U.S. Dep't of Treasury*, No. 84 Civ. 1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986) for the proposition that the names and addresses of registered institutional owners of "Flower bonds" issued by the Treasury were information "obtained from a person" under Exemption 4. The unreported decision in *Clarke* contained no analysis at all of the "obtained from a person" issue.

According to Petitioner's logic, the Board's records of Federal Reserve lending are necessarily "obtained from a person" under Exemption 4 "because *every* commercial transaction by a third party with the government reflects both third-party and government action; the transaction voluntarily entered into by the third party would not exist but

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[16] Another decision involving the Export-Import Bank, *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the U.S.*, 464 F. Supp. 804 (D.D.C. 1979), is of even less help to Petitioner because it did not analyze clearly how the requested information was obtained "from a person." In fact, *Comstock* was at war with itself on this very question, reciting at one point that the loan agreement in question was "obtained from a person" because it was not obtained from a federal agency (*see id.* at 806) and then stating in the next breath that "the information contained in the loan agreement is not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." *Id.* at 807. Thus, the district court decision in *Comstock* provides no sound analytical basis for finding that Federal Reserve lending records were obtained "from a person."

for government approval and involvement." Pet. at 25. (Emphasis in original). But this argument proves too much. The purpose of FOIA was to make it easier for the public "to be informed about what [its] government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Taken to its logical conclusion, Petitioner's argument would mean that records of the government's commercial dealings with third parties cease to reflect what the *government* is "up to" simply because they correspondingly say something about what the *third party* is "up to" as the counterparty to the government's commercial transaction. The Second Circuit properly rejected that construction, observing that "it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons." *Bloomberg*, 601 F.3d at 149.

Petitioner adds a follow-on argument, asserting that the Board should have been allowed to withhold exempt information that is "inextricably intertwined" with non-exempt data. Pet. at 31-33 (citing 5 U.S.C. 552(b)). In essence, Petitioner concedes that the reports sought by Fox Business contain non-exempt information (the record of Federal Reserve lending activity), but asserts that, because the same information reveals the banks' identities, as well as the terms on which those banks applied for, and then accepted, short-term credit, the information is also exempt and "intertwined" with the Board's records. *See id.* This second argument is simply another way of stating the first, *i.e.*, that the identity of a borrower and the fact of the FRBs' lending is

information "obtained from a person" rather than reported by the FRBs and incorporated in a report of the Board. Since there is no "confidential" information to be "intertwined," the Petition should be denied.[17]

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[17] Since the Second Circuit determined that the information at issue was not "obtained from" the borrowers, it did not proceed to the third prong of Exemption 4 and address whether any of the borrowing banks would face competitive harm from disclosure of the reports. Even if this Court were to reverse the Second Circuit's determination that the affected records were not "obtained from" the borrowers, review in this Court would be futile because the record below still does not contain particularized evidence that any single borrower faced a threat of competitive harm. Just as Petitioner has failed to plead associational standing, *see* Point II.B, *supra*, the record does not permit a finding of competitive injury under the second prong of *National Parks*. Indeed, after remand in the *National Parks* case, the district court conducted evidentiary hearings, examining the likelihood of competitive injury from release of Park Service records as to each of the seven affected concessioners. *See National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) ("National Parks II"). Upon review, the D.C. Circuit affirmed the district court's judgment in favor of the Park Service as to five of the seven concessioners, but found that the record did not substantiate a risk of competitive harm as to the other two. "Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA." *National Parks II*, 547 F.2d at 680. Here, by contrast, the Board never tried to adduce evidence of an individualized likelihood of competitive harm to the institutions that borrowed from the Federal Reserve. Instead the Board—and now Petitioner—offered the conclusory assertion that disclosure of Federal Reserve borrowing carries a "stigma" for all of the borrowing banks. This would not have passed muster under *National Parks II*. If the Board had been correct in asserting that disclosure would have resulted in competitive harm,

B. The Court of Appeals Correctly Declined to Recognize the "Program Effectiveness" Test.

In a final effort to conjure up an issue worthy of certiorari review, Petitioner seizes upon the Second Circuit's rejection of the "program effectiveness" theory in *Bloomberg*, asserting that the test has been endorsed by two other Circuits. As we have explained, however, the program effectiveness exception has never actually prevented the disclosure of any record, *see supra*, and the Second Circuit correctly rejected those precedents in light of controlling authority from this Court.

As the Second Circuit correctly observed, the proposed "program effectiveness" expansion of Exemption 4 is the "functional equivalent" of a similar "public interest" test that this Court squarely rejected in FOMC over 30 years ago. *Bloomberg*, 601 F.3d at 150. In *FOMC*, 443 U.S. at 353-54, this Court found the "public interest" standard fundamentally incompatible with FOIA's policy of public disclosure:

> [The FOMC's] principal argument, instead, is that Exemption 5 confers general authority upon an agency to delay disclosure of inter-agency memoranda *that would undermine the effectiveness of the agency's policy* if released immediately. . . We must reject this analysis . .

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particularized evidence could have been adduced under seal to substantiate that assertion. Following *National Parks II*, the competitive position of each bank would be different. Absent such evidence, Exemption 4 cannot apply on the basis of any private interest in the confidentiality of the Board's records.

> . . Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda . . . whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or would otherwise not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest standard." (Emphasis added).

In *Bloomberg*, and hence in this case, the Second Circuit correctly held that, like the "public interest" standard in *FOMC*, the proposed "program effectiveness" standard would allow a federal agency to frustrate FOIA disclosure upon little more than its own *ipse dixit*. 601 F.3d at 151. In the final analysis, the Court of Appeals' holding comports fully with FOIA's statutory purpose and is faithful to well-established precedents of this Court. Accordingly, no compelling reason exists to revisit the Second Circuit's judgment.[18]

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[18] In the event that this Court should grant the *Bloomberg* petition for a writ of certiorari, Fox Business respectfully submits that the petition in this matter should be granted and consolidated for argument with *Bloomberg*. The two petitions present precisely the same issues and the cases were heard simultaneously by the Second Circuit. They come to this Court via separate petitions only because Respondent had previously intervened in *Bloomberg*, but had to delay its petition in this case until it obtained leave to intervene from the Second Circuit.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
PETITIONER

v.

FOX NEWS NETWORK, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In this case, the Board of Governors of the Federal Reserve System (Board) withheld the names, loan amounts, and loan dates of individual borrowers that requested loans from the discount window and Federal Reserve emergency lending facilities after concluding that release of such information would harm the competitive position of the borrowers and would impair the Board's future ability to maintain stability in financial markets. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the information at issue was not "obtained from a person" within the meaning of Exemption 4 because the information resulted from the agency's own executive actions in granting the loans and thus was not obtained from the borrowers.

2. Whether the court of appeals erred in holding that the fact that disclosure of the information would harm the agency's ability to carry out its functions does not make the information "confidential" within the meaning of Exemption 4.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A16) is reported at 601 F.3d 158. The opinion and order of the district court (Pet. App. A17-A51) is reported at 639 F. Supp. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. A timely petition for rehearing was denied on August 20, 2010 (Pet. App. A5-A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Reserve Act, 12 U.S.C. 221 *et seq.*, provides that the Board of Governors of the Federal Reserve System (Board), along with the Federal Open Market Committee, "shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. 225a. The Federal Reserve Act vests lending authority in the regional Federal Reserve Banks and the power to authorize and supervise lending in the Board. 12 U.S.C. 347b(a); see also 12 U.S.C. 301, 248(j), 343.

The discount window is a permanent lending program through which the twelve regional Federal Reserve Banks, subject to Board regulation and supervision, lend funds on a secured, short-term basis to eligible depository institutions in their districts. C.A. App. A127-A128. In response to the recent financial crisis, the Board authorized the Reserve Banks to initiate a number of additional, temporary special credit and liquidity facilities to relieve severe liquidity strains on the market and reduce risks to financial stability. Specifically, in the latter part of 2007, the Board authorized the Reserve Banks, under Section 10B of the Federal Reserve Act, 12 U.S.C. 347b(a), to establish the Term Auction Facility, which provided longer than overnight funding to depository institutions with interest rates determined at auction. In early 2008, as financial market conditions continued to deteriorate, the Board authorized the Reserve Banks, under the emergency authority of Section 13(3) of the Federal Reserve Act, 12 U.S.C. 343, to initiate programs, including: the Primary

Dealer Credit Facility, under which the Federal Reserve Bank of New York made overnight funds available to "primary dealers"[1] that are not eligible to borrow at the discount window, and the Term Securities Lending Facility, which provided for 28-day loans of Treasury securities. C.A. App. A129-A131.

In the past, the Board and the Federal Reserve Banks have released extensive public information about lending made under such programs, including the terms of loans, eligibility requirements, current and historical lending data, and types and value of collateral accepted. C.A. App. A136. That information, however, generally has been released in the aggregate for each Federal Reserve district and facility and has not been broken down by borrower or by specific loan. Thus, historically speaking, neither the Board nor the Reserve Banks have disclosed information regarding individual loans, such as the names of individual borrowers, or the amounts, dates, or specific collateral pledged for specific loans. *Id.* at A137.

The Board views such information as sensitive and confidential because Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers unable to secure funding from market sources on a short-term basis. C.A. App. A97, A103. Although healthy financial institutions also borrow from Reserve Banks for ordinary operational reasons, and to obtain liquidity in markets that are temporarily closed to participants, the Reserve Banks' role as lenders of last resort to institutions unable to secure short-term funds in

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[1] Primary dealers are designated banks and securities brokers with which the Federal Reserve Bank of New York trades U.S. government securities as counterparties in executing open market operations. C.A. App. A100.

the market results in a stigma associated with borrowing from them. *Id.* at A137-A138. That stigma can cause significant competitive injury to financial institutions should information regarding individual loans become public. *Ibid.* Moreover, the Board has concluded that if depository institutions and primary dealers were unwilling to come to the Reserve Banks for their funding needs, particularly in times of economic crisis, the Board's ability to administer lending programs crucial to maintaining national financial and economic stability would be severely undermined. *Id.* at A143-A146.

2. On November 10, 2008, Fox News Network, LLC (a respondent in this Court) filed a request with the Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, seeking "the names of institutions receiving Federal Reserve lending" from eleven named programs and "any other Federal Reserve lending facility," as well as "an accounting of the collateral provided by these institutions in exchange for the lending" from August 8, 2007 to November 17, 2008. C.A. App. A169-A171. A subsequent request sought, for the months of September and October 2008, "records sufficient to identify all institutions that have participated in any Fed lending program," records sufficient to identify "all collateral pledged" by each such institution, and "the amount borrowed or advanced to the institution." *Id.* at A172-A172.1.

After providing several responsive records, the Board withheld approximately 6187 pages of Remaining Term Reports (Reports) responsive to the request. The Reports are prepared by the staff of the Board's Division of Monetary Affairs using raw data provided by each Reserve Bank. The Reports show outstanding extensions of credit under the discount window and emer-

gency lending programs. C.A. App. A134, A155-A156. The Reports also contain names of borrowers that requested loans, the originating Reserve Bank District, individual loan amounts, the type of lending program borrowed from, and loan origination and maturity dates. *Ibid.*

The Board withheld the Reports under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4).[2] The Board explained that disclosure of the Reports would reveal the identities of the institutions that sought funds from the Reserve Banks under "last resort" lending programs, and thus would likely cause substantial competitive injury to those institutions that provided the information at issue to the Reserve Banks. C.A. App. A179-A181. In addition, the Board explained that the future reluctance of institutions to participate in such lending programs would impair the Board's ability to carry out statutory functions in a time of economic crisis. *Ibid.*

3. In response, Fox News filed this FOIA action in federal district court. The district court granted summary judgment for the Board, holding that the Reports may be withheld under FOIA Exemption 4. Pet. App. A17-A51. The court concluded that the information at issue was "obtained from a person," reasoning that "the borrower's name, the amount it must borrow, and the

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[2] The Board also invoked FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Because the Board did not rely on Exemption 5 after the district court proceedings, this brief does not discuss it further.

property it volunteers to provide as collateral is information that originated with the borrower and is reflected in the data Fox seeks." *Id.* at A42-A46. The court further concluded the information is "privileged or confidential" within the meaning of Exemption 4 because the Board "show[ed] specific and substantial harms to borrowers if the information about [d]iscount [w]indow loans were disclosed." *Id.* at A47-A48. In the alternative, the court held that the information was "privileged or confidential" under a "program effectiveness" test because disclosure "would compromise the Board's effective execution of its statutory responsibilities." *Id.* at A48-A50.

4. The court of appeals vacated and remanded, adopting the holding in *Bloomberg, L.P.* v. *Board of Governors*, 601 F.3d 143 (2d Cir. 2010) (*Bloomberg*), petition for cert. pending, No. 10-543 (filed Oct. 26, 2010), a companion case decided the same day and that involved FOIA requests for much of the same information at issue here. Pet. App. A7-A16. In *Bloomberg*, the court of appeals first held that the individual loan information was not "obtained from a person" (*i.e.*, the borrowing institutions) as required by Exemption 4. 10-543 Pet. App. 8a-9a. The court acknowledged that a loan application would be "obtained from a person," but reasoned that "Bloomberg's FOIA request does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Ibid.* The court of appeals stated that "what is requested is not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions." *Id.* at 10a. The court explained that "even if the loans were granted automatically, they did not come into existence until the Federal Reserve

Bank took executive action by granting the loan. The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons." *Id.* at 12a.

The court of appeals in *Bloomberg* also rejected the Board's alternative argument that the information on individual borrowers was protected under Exemption 4 because it was confidential commercial information obtained by the Board from the Reserve Banks. The court declined to decide whether the individual Reserve Banks that submitted the information to the Board are "persons" for purposes of Exemption 4. *Bloomberg*, 10-543 Pet. App. 12a n.2. Rather, the court held that the information was not "confidential." The court explained that information is confidential for purposes of Exemption 4 if its disclosure would have the effect of harming "the competitive position of the person from whom the information was obtained." *Id.* at 13a (quoting *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006)). The court concluded that because the Board did not allege that the relevant "person" in this instance—the Reserve Bank itself—suffered any competitive harm, the information could not be deemed "confidential" under that test. *Ibid.*

The court of appeals in *Bloomberg* then declined to "extend" the scope of Exemption 4's "confidential" requirement to cover information that, if disclosed, would harm the Board's ability to carry out its mission or undermine program effectiveness. *Bloomberg*, 10-543 Pet. App. 13a-14a. The court held that the "program effectiveness" test, previously endorsed by the First and D.C. Circuits, "would give impermissible deference to

the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Id.* at 14a (citing *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

5. On May 3, 2010, the Board filed a petition for rehearing en banc. The petition challenged the panel's holding that the information at issue was not "obtained from a person," as well as its holding that a "program effectiveness" test for confidentiality is not cognizable under Exemption 4. The court of appeals denied the petition on August 20, 2010. Pet. App. A5-A6.

6. On July 21, 2010, while the petitions for rehearing were pending in this case and *Blomberg*, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, became law. The Dodd-Frank Act required the release of some of the information that had been withheld by the Board pursuant to Exemption 4 and also established prospective standards governing the disclosure (after specified intervals) of loan-related information of the type at issue in this case.

a. Section 1109(c) of the Dodd-Frank Act required the Board to "publish on its website, not later than December 1, 2010," certain information concerning emergency lending facilities authorized by Section 13(3) of the Federal Reserve Act from December 1, 2007 through July 21, 2010. § 1109(c), 124 Stat. 2129. Those facilities include three of the facilities at issue in this case: the Term Auction Facility, the Primary Dealer Credit Facility, and the Term Securities Lending Facility (see pp. 2-3, *supra*). Under the Act, the Board must disclose: (1) the names of recipients of assistance; (2) the type of assistance provided; (3) the value or amount

of assistance; (4) the dates; and (5) the specific terms of any repayment expected, including interest rate and collateral. § 1109(c)(1)-(5), 124 Stat. 2129. Consistent with its obligation under the Act, the Board disclosed that information on December 1, 2010. As a result of the Board's recent disclosure, the part of the FOIA request pertaining to the emergency lending facilities has been rendered moot. The only information remaining at issue in this case concerns lending from the discount window.

b. Section 1103 of the Dodd-Frank Act establishes prospective standards for the protection and subsequent release of information concerning lending under both the discount window and emergency lending programs. Those prospective standards apply to "information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank." § 1103(b), 124 Stat. 2118. For transactions executed after its effective date (July 21, 2010), the Act sets a schedule of delayed disclosure of (1) "the names and identifying details of each borrower, participant, or counterparty"; (2) "the amount borrowed"; (3) "the interest rate or discount paid"; and (4) "information identifying the types and amounts of collateral pledged." *Ibid.*

The Dodd-Frank Act does not, however, require immediate release of such information. For emergency lending facilities created under Section 13(3) of the Federal Reserve Act, the information must be released one year after the effective date of termination of the authorization of the facility. § 1103(b), 124 Stat. 2118. With respect to discount window and open market operations, the information must be released by "the last day of the

eighth calendar quarter following the calendar quarter in which the covered transaction was conducted." *Ibid.* The Chairman of the Board may publicly release this information earlier if he determines that such disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility. § 1103(b), 124 Stat. 2118-2119. For all of the loans subject to this section, the information "shall be confidential," including for purposes of FOIA, until the mandatory release date (unless the Chairman determines to release it earlier). § 1103(b), 124 Stat. 2119.

As noted above, the new standards set forth in Section 1103 operate only on a prospective basis. Section 1103(b) provides that "[n]othing in this section is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of enactment [of the Act]." 124 Stat. 2120.

7. On November 16, 2010, the court of appeals granted petitioner's motion to intervene in this case and to stay the mandate pending the filing and disposition of a petition for a writ of certiorari. Pet. App. A1-A2.

ARGUMENT

The instant petition raises the same questions presented by the pending petition for certiorari in *The Clearing House Ass'n* v. *Bloomberg, L.P.*, No. 10-543. As noted above (p. 6, *supra*), the court of appeals in this case adopted the reasoning and holding of its decision in *Bloomberg*, which addresses much of the same information at issue here. For the reasons explained in our brief in opposition (at 10-18) to the petition for a writ of certiorari in *Bloomberg* (concurrently filed with this brief), further review is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

FOX NEWS NETWORK, LLC, and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Solicitor General agrees that the Second Circuit erred in issuing two categorical and important interpretations of Exemption 4 of the Freedom of Information Act ("FOIA")—specifically, that (1) commercially sensitive third-party information is not "obtained from a person" once subject to "executive action"; and (2) a federal agency cannot withhold such information on the basis that its disclosure would harm the effectiveness of its programs.

The Second Circuit's erroneous rulings, if permitted to stand, will harm numerous federal programs and third parties that participate in those programs, by eliminating FOIA Exemption 4 protection over the commercially sensitive final terms on which third parties and federal agencies transact with each other.

As the Solicitor General recognizes, the Second Circuit openly split with the D.C. and First Circuits in holding that FOIA Exemption 4 does not protect a federal agency's interest in the effectiveness of its programs, and effectively split with the D.C. Circuit and numerous district courts over whether Exemption 4 protects the final terms of agency commercial transactions with third parties (*e.g.*, line-item pricing information in federal contracts, government royalty rates, and transaction-level details of government-issued insurance, loans, and bonds).

Despite recognizing that the Second Circuit erred on important questions of FOIA law, the

Solicitor General recommends that this Court deny certiorari on grounds unrelated to the merits—that is, because the Dodd-Frank Act creates a new disclosure regime for future Discount Window lending. Though all parties agree that the Act's enactment does not moot this appeal, the Solicitor General believes that the Court should not grant certiorari *in this case*, because this new regime means that the Federal Reserve Board will not be confronted with specific FOIA requests for post-enactment Discount Window lending data.

The Solicitor General's recommendation is short-sighted and unpersuasive, because this Court does not decide whether to grant certiorari based on whether the *specific factual situation* leading to the decision below will recur, but on the breadth and importance of the *legal rulings* rendered in that decision. The time for this Court to review the Second Circuit's important (and erroneous) rulings is now, and not in some hoped-for "future case." This circuit split is between the two most important circuits on issues of FOIA law: the Second Circuit (the media and financial capital of the country) and the D.C. Circuit (the leading circuit on FOIA law).

As a practical matter, it is difficult to correct erroneous circuit court rulings interpreting the FOIA. In the Second Circuit, going forward, any FOIA requester will be able to bind an agency to that Circuit's erroneous law, under the threat of attorney's fees and costs if the requester must force compliance through court action. And, even if the agency contests the FOIA request in federal court, it

is unlikely that courts in the Second Circuit would stay any adverse ruling to allow for further appeals.

The Second Circuit itself, recognizing the importance of the legal issues presented here, stayed its rulings to allow for this Court's review, even after the enactment of the Dodd-Frank Act. But, if this Court denies certiorari, "future cases" likely will become moot before affected parties can seek certiorari.

I. THIS CASE IS THE IDEAL VEHICLE FOR CORRECTING THE SECOND CIRCUIT'S ERRORS IN INTERPRETING IMPORTANT PROVISIONS OF THE FOIA.

A. The Dodd-Frank Act Did Not Moot this Appeal.

All Respondents agree that the Dodd-Frank Act did not moot this appeal. (*See* Brief for the Federal Respondent ("SG Br.")[1] at 9, 10, 17; Fox Br. at 19; Bloomberg Br. at 2.) Indeed, Section 1103(b) of the Dodd-Frank Act expressly states that nothing in its new disclosure provisions is "meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment."

Instead, Bloomberg and Fox contend that the Act either "effectively mooted" this appeal or

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[1] References to the Solicitor General's brief, The Clearing House's petition in support of certiorari ("Clearing House Br."), and the appendix are to those filed in *The Clearing House Association L.L.C.* v. *Bloomberg*, No. 10-543.

confirmed that the requested information is commercially "stale." (Bloomberg Br. at 2; Fox Br. at 20.) Not so. Tellingly, while requiring the Federal Reserve Board to disclose transaction-level details of *emergency* lending that took place prior to the Act, Congress specifically did *not* require release of pre-enactment *Discount Window* lending data. This differentiation confirms the Board's longstanding and express promise to banks that the details of their Discount Window lending would be kept confidential.

When this same "staleness" argument was raised below, the Second Circuit chose *not* to resolve the appeal on this ground. In fact, the Second Circuit did not question the "plausible" and "forcefully made" arguments by The Clearing House and the Federal Reserve Board that disclosure of the Discount Window information would "harm the banks that borrowed" and "the banking system as a whole." (15a.)

B. The Dodd-Frank Act Does Not Lessen the Importance of the Second Circuit's Novel and Categorical FOIA Rulings.

The Solicitor General recognizes that the Second Circuit ruled "categorical[ly]" that third-party confidential information ceases to be "obtained from a person" once reflected in an agency's "executive action." (SG Br. at 11-12.) The Solicitor General further agrees that the Second Circuit split with the D.C. and First Circuits in rejecting the "program effectiveness" test. (*Id.* at 14-15.) Thus,

like the Second Circuit, which stayed its mandate in both *Bloomberg* and *Fox* based on the reasonable probability that four justices would grant certiorari, the Solicitor General "does not intend to suggest that the questions presented [in The Clearing House's petition] are unimportant or that they would not warrant this Court's review in an appropriate case." (*Id.* at 18.)

Instead, after spending almost seven pages explaining why the Second Circuit's categorical FOIA rulings are wrong, the Solicitor General concludes, perfunctorily, that this case may not be the proper vehicle for this Court's review. The Solicitor General does so by reasoning that "the specific issue" in this case—*i.e.*, whether a FOIA requester is entitled to Discount Window lending data—"will not recur for post-enactment loans covered by the Act." (SG Br. at 17.) Thus, the Solicitor General suggests that this Court await a "future case" to "correct the court of appeals' errors." (*Id.* at 18.)

This suggestion is unpersuasive. *First*, the Solicitor General cites no authority for its statement that certiorari is not appropriate unless the specific factual "context" giving rise to the appeal will recur. (SG Br. at 11.) This omission is not surprising, because this Court's exercise of its certiorari review turns *not* on the recurrence of the *specific facts* leading to the rulings on appeal, but the likely impact of those legal rulings *in other contexts*. This principle is demonstrated time and again in FOIA law, where the Court has granted certiorari to review legal rulings in cases involving non-recurring requests for unique documents. *See, e.g.*, *U.S. Dep't*

of State v. *Washington Post Co.*, 456 U.S. 595, 596, 598 (1982) (certiorari granted to review "construction of 'similar files' language" of Exemption 6 in case concerning "documents indicating whether [two Iranian nationals] hold valid U.S. passports"); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 164 (2004) (certiorari granted "to resolve a conflict in the Courts of Appeals over the proper interpretation of Exemption 7(C)" in case involving 11 death-scene photographs).

Second, it is not clear when or even if there will be the right "future case" that would allow this Court to correct the Second Circuit's errors. (SG Br. at 18.) An erroneous circuit court ruling in FOIA law—particularly one that binds the Nation's financial and media capital—presents unique concerns. Under 5 U.S.C. § 552(a)(4)(B), any FOIA requester that resides in the Second Circuit—soon to become the FOIA capital of the U.S.—will be able to bind a federal agency to that court's law. (*See* Clearing House Br. at 6.) Agencies thus will yield to FOIA requests initiated in the Second Circuit, for fear of being saddled with "attorney fees and other litigation costs" should their decision to withhold information be overturned by a federal district court. 5 U.S.C. § 552(a)(4)(E)(i). Finally, any adverse district court ruling would be unlikely to reach this Court, because of the difficulty of obtaining a stay at the district court level to battle controlling precedent. Thus, FOIA cases would become moot long before they could reach this Court.

II. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING WILL HAVE FAR-REACHING EFFECTS.

A. The Second Circuit Ignored a Long Line of Cases Protecting from Disclosure the Confidential Terms on Which Third Parties Transact with Federal Agencies.

The Solicitor General agrees that the Second Circuit ruled "categorical[ly]" that information "ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 11-12 (quoting 10a).) Indeed, the Solicitor General recognizes that, except for one case erroneously decided by the Western District of New York, district courts have "held that information similar to the identifying information at issue here was 'obtained from a person' within the meaning of Exemption 4." (*Id.* at 12.) The Solicitor General similarly acknowledges that "the D.C. Circuit has applied Exemption 4 to line-item pricing in government contracts even though the prices resulted in part from government action." (*Id.* at 13.) These cases simply cannot be reconciled with the Second Circuit's "categorical" "obtained from a person" ruling.

Fox and Bloomberg primarily argue in opposition that, in some of these other cases, the transacting third parties supplied commercial or financial information in the *application* process leading to the consummated transaction. (*See* Fox Br. at 30-31; Bloomberg Br. at 18-19.) Their

proffered "distinction" is one without a difference, because these courts have indisputably protected from disclosure the *final* terms on which the third parties transacted with the agency, including:

- The *final* terms of line-item prices in government contracts;
- The *final* terms of Export-Import Bank insurance and credit extensions;
- The *final* terms of Treasury bond issuances, including purchaser names and details of bond amounts, coupons, and maturity dates; and
- The *final* terms of National Institutes of Health royalty rates. (*See* Clearing House Br. at 22-26.)

In case there were any doubt about the likely impact of the Second Circuit's ruling, one lower court has *already* applied the Second Circuit's erroneous "obtained from a person" ruling to require the Treasury Department to disclose the name of a commercial bank that applied for funding through an important Treasury lending program. *See Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ----, 2010 WL 3705283 (S.D.N.Y. Sept. 3, 2010). Following *Bloomberg*, this court did not address the Treasury Department's argument that disclosure likely would "'result in substantial competitive harm to the [applicant's] position in the market.'" *Id.* at *36. Instead, the court ordered disclosure on the sole basis that the requested information was not "obtained from a person," because it "'did not come into existence until [Treasury] made the decision to approve the loan

request.'" *Id.* at *37 (quoting *Bloomberg*, 601 F.3d at 148 (alteration in original)).

Finally, no party disputes that the Second Circuit's ruling will have nationwide effects, because FOIA vests jurisdiction in, among other venues, "the district court of the United States in the district in which the complainant resides, or has his principal place of business." 5 U.S.C. § 552(a)(4)(B). (*See* Clearing House Br. at 6.) Thus, every federal agency will be subject to Second Circuit law when a FOIA requester resides or does business in that Circuit, throwing into doubt decades of agency practices protecting the confidentiality of sensitive details concerning completed commercial transactions. On this basis, the Solicitor General successfully petitioned this Court for certiorari in *FCC* v. *AT&T*, arguing that an erroneous ruling from the Third Circuit would "throw[] longstanding FOIA practices and procedures into doubt on a government-wide basis." (Brief for the Petitioner at 28, *FCC* v. *AT&T*, No. 09-1279.) The same is true here.

B. The Second Circuit's Error is Plain and Should be Corrected Now.

The Second Circuit's "obtained from a person" ruling rested "on the mistaken premise that information provided to the government ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 12 (quoting 10a).) The premise is wrong because, as all parties here agree, an agency can withhold information *in its entirety* if, as here, it consists of exempt and non-

exempt data that are "inextricably intertwined." (*See* Clearing House Br. at 27-28 & n.13.)

Instead, Bloomberg argues that, "at most," The Clearing House seeks review over an incorrect "factual determination." (Bloomberg Br. at 20.) But the Second Circuit here broadly held, as a matter of law, that information is no longer "obtained from a person" so long as it is the product of "executive action." (12a.) This is precisely the kind of categorical ruling that merits this Court's review and correction.

III. THIS COURT SHOULD CORRECT THE SECOND CIRCUIT'S ERRONEOUS REJECTION OF THE "PROGRAM EFFECTIVENESS" TEST ADOPTED BY THE D.C. AND FIRST CIRCUITS.

A. The Second Circuit Created a Clear Circuit Split on an Important Question of Federal Law.

The Second Circuit openly rejected the "program effectiveness" test "adopted by the First and District of Columbia Circuits." (13a.) The Solicitor General acknowledges this split (*see* SG Br. at 7, 10, 14-15); so too do Bloomberg and Fox (*see* Bloomberg Br. at 21-22; Fox Br. at 21).

Fox nonetheless contends that this clear split is "shallow and stale" because the D.C. and First Circuits' adoption of the "program effectiveness" test have stood for over three decades and because there is a "dearth" of cases applying this test. (Fox Br. at 21-22.) Bloomberg further argues that the issue has

not sufficiently "percolated" at the appellate level, because "only three Circuit Courts have addressed the issue." (Bloomberg Br. at 26.)

Both Fox and Bloomberg are wrong. That the D.C. and First Circuit decisions endorsing the "program effectiveness" test are longstanding supports this Court's grant of certiorari. There is no "dearth" of law; only *settled* law applying these tests to discrete government programs that depend on assuring third parties that details of their transactions will remain confidential.

For this reason, Bloomberg's suggestion that this Court should await additional Circuit decisions is meritless, particularly when this split is between the two most important Circuits on FOIA law. *See, e.g., Nat'l Assoc. of Greeting Card Publishers* v. *U.S. Postal States Serv.*, 462 U.S. 810, 820 (1983) (grant of certiorari "[b]ecause of the inconsistencies in the holdings of the Second and District of Columbia Circuits").

B. The Clearing House has "Standing" to Correct the Second Circuit's Erroneous Rejection of the "Program Effectiveness" Test.

Fox also erroneously maintains that The Clearing House lacks "standing"[2] to correct the

[2] Neither the Solicitor General nor Bloomberg (which unsuccessfully challenged The Clearing House's standing in the District Court) challenge The Clearing House's standing. Only Fox does so, in a footnote that recycles its arguments rejected by the Second Circuit—suggesting that The Clearing House

(footnote continued)

Second Circuit's erroneous rejection of the "program effectiveness" test. (Fox Br. at 24.) Unlike the cases cited by Fox, The Clearing House is not *raising* an interest that the government has not itself asserted. The Federal Reserve Board has consistently taken the position, at both the administrative and judicial levels, that disclosure of the requested information would harm its lending programs and its statutory missions. The Solicitor General endorses this position on the merits now (*see* SG Br. at 14-17), and presumably would do so again if this Court accepts certiorari.

Moreover, unlike the *exclusive* government interests at issue in Fox's cases, the program effectiveness test is not "designed to protect interests of the government *only*." *Sears, Roebuck & Co.* v. *Gen. Servs. Admin.*, 384 F. Supp. 996, 1004 (D.D.C. 1974) (emphasis added). This test merges

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(footnote continued)
must name those members who borrowed from the Discount Window, and that The Clearing House failed to particularize the harm from disclosure of the requested information. Fox's first argument fails, because, in a declaration provided to the Second Circuit, The Clearing House stated—unequivocally—that certain of its members *have* borrowed from the Discount Window during the time periods covered by Fox's request. *See Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity* v. *Downtown Dev.*, 448 F.3d 138, 145 (2d Cir. 2006) (no requirement that an association "'name names'" in order "properly to allege injury in fact to its members."). Fox's second argument fails, because the record contains detailed assertions of the harm likely to befall borrowing institutions should the requested documents be disclosed. (*See* Clearing House Br. at 9-11.)

Exemption 4's twin aims of protecting both the interests of "the Government and the individual," *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974), because third parties have an interest in advancing—and continuing to benefit from—the government programs threatened by disclosure of their sensitive commercial information.

C. The Second Circuit Erred in Rejecting the "Program Effectiveness" Test.

The Solicitor General agrees that the program effectiveness test furthers Exemption 4's purposes "by protecting sensitive commercial or financial information about participants in government loan, grant, and licensing-type programs where disclosure would demonstrably undermine the basic objectives of those programs." (SG Br. at 15.) The Solicitor General also agrees that the Second Circuit "mistakenly concluded" that this test was "the 'functional equivalent' of the 'public interest' standard for withholding under Exemption 5," which was rejected by this Court in *FOMC* v. *Merrill* due to concerns that are not present here. (SG Br. at 16.)

Fox and Bloomberg make no reasoned efforts to refute these points, quoting primarily from *Merill*, and the Second Circuit's erroneous reliance on it, without explaining how the program effectiveness test represents the same kind of unbounded expansion asserted by the agency in *Merrill*. (Fox Br. at 34-35; Bloomberg Br. at 22-23.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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